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Supreme Court of the United States

October Term, 1963.

No. 810

FRANCES H. SELIGSOHN,
Petitioner,

and

EXPORT-IMPORT CLOTHING CO.

v.

THE PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY, and STRAWBRIDGE & CLOTHIER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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INDEX

	Page
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
1. The Condemnation of Petitioner's Property Is Not for a Public Purpose, and Therefore Is in Violation of the Due Process Clause of the Fourteenth Amendment	10
2. The Due Process Clause of the Fourteenth Amendment Is Violated Where the Court Below Refuses to Make an Independent Judicial Inquiry Into the Nature of a Condemnation and Simply Rubber-Stamps the Condemning Authority's Action	15
3. Conclusion	20
APPENDIX "A":	
Excerpts From Parking Authority Law	1a
APPENDIX "B":	
Adjudication (Court of Common Pleas No. 5 of Philadelphia County)	5a
Opinion (Court of Common Pleas No. 5 of Philadelphia County)	19a
Opinion (Supreme Court of Pennsylvania)	24a
Dissenting Opinion (Supreme Court of Pennsylvania)	28a
APPENDIX "C":	
Complaint in Equity (Court of Common Pleas No. 5 of Philadelphia County)	30a
Plaintiffs' Request for Findings of Fact and Conclusions of Law (Court of Common Pleas No. 5 of Philadelphia County)	37a
Defendants' Requests for Findings of Fact and Conclusions of Law (Court of Common Pleas No. 5 of Philadelphia County)	90a
APPENDIX "D":	
Table—"Supply of and Demand for Parking Spaces"	116a

TABLE OF CASES CITED.

	Page
Berman v. Parker, 348 U. S. 26, 99 L. Ed. 27; 75 S. Ct. 98 (1954)	11
The Citizens' Saving and Loan Association of Cleveland, Ohio v. Topeka City, 20 Wall. 655, 87 U. S. 655, 22 L. Ed. 455 (1874)	10
City of Cincinnati v. Vester, 281 U. S. 439, 74 L. Ed. 950, 50 S. Ct. 360 (1930)	16
County of Allegheny v. Frank Mashuda Co., 360 U. S. 185, 3 L. Ed. 1163, 79 S. Ct. 1060 (1959)	11
Howard Mills Co. v. Schwartz Lumber & Coal Co., 77 Kan. 599, 95 P. 559, 18 LRA (NS) 356	10
Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305, 88 Atl. 487 (1913)	10
Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364 (1937)	12
Townsend v. Epstein, 93 Md. 537, 49 A. 629, 52 LRA 409, 86 A. St. Rep. 441 (1901)	10, 14
Wilkenson v. Leland et al., 27 U. S. (2 Pet.) 627, 7 L. Ed. 543 (1829)	12

STATUTES AND AUTHORITIES CITED.

	Page
2 Cooley, Constitutional Limitations, 1124 et seq., 8th Ed. (1927)	12, 17
Highway Capacity Manual of the United States Bureau of Public Roads, pages 6-71	7
2 Nichols, Eminent Domain, Third Edition (1950) 560 § 7.6	11, 15
Parking Authority Law of the Commonwealth of Pennsylvania, Act of June 5, 1947, P. L. 458, as amended, 53 P. S. § 341 et seq.	3
28 U. S. C. A. § 1257(3)	2
United States Constitution, Fourteenth Amendment	3, 10, 15, 17, 19, 20, 21

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner, FRANCES H. SELIGSOHN, prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Pennsylvania which affirmed a Decree of the Court of Common Pleas No. 5 of Philadelphia County, sitting in Equity, refusing to enjoin a condemnation by the respondent Philadelphia Parking Authority.

CITATIONS TO OPINIONS BELOW.

The Adjudication of the Chancellor below is unreported and is printed in Appendix "B" hereto, *infra*, p. 5a. The Opinion of the Trial Court en banc is similarly unreported and is printed in Appendix "B" hereto, *infra*, p. 19a. The Per Curiam Opinion of the Supreme Court of Pennsylvania, filed October 11, 1963, is reported at 412 Pa. 372 (1963), and printed in Appendix "B" hereto, *infra*, at page 24a, and the dissenting Opinion by three of the seven justices of the Pennsylvania Supreme Court is reported at 412 Pa. 376, and printed in Appendix "B" hereto, *infra*, at page 28a. A Petition for Reargument to the Pennsylvania Supreme Court was denied on November 13, 1963, without opinion.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on October 11, 1963, a Petition for Reargument was filed within the ten (10) days required by the Rules of the Pennsylvania Supreme Court, and the said Petition for Reargument dismissed on November 13, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(3).

QUESTIONS PRESENTED.

1. Were Petitioner's rights guaranteed by the Fourteenth Amendment to the United States Constitution violated when the clothing store which she operated since her husband's death, through a wholly-owned corporation, was condemned by a Parking Authority and turned over to two neighboring large department stores simply to supply parking for the department stores with whose clothing departments she had been in competition, in the absence of substantial proof that there was a public need for parking in the area, and where the sole purpose was to induce people to shop in the department stores and the effect was to put Petitioner out of business?

2. Upon an expropriation of Petitioner's property by a State agency, does the Fourteenth Amendment to the United States Constitution guarantee her an independent judicial review of whether the taking was in fact for a public purpose, or may the judicial inquiry be limited to the bare question of whether the condemnor had abused its discretion?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States are:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Pertinent provisions of the Parking Authority Law of the Commonwealth of Pennsylvania, Act of June 5, 1947, P. L. 458, as amended, 53 P. S. § 341 et seq., are printed in Appendix "A" hereto, *infra*, at page 1a.

STATEMENT OF THE CASE.

Petitioner is the owner of a building in the Center City Philadelphia retail business district, in which a corporation wholly owned by her was engaged in the retail sale of men's, women's and children's wearing apparel. Her late husband had been in the retail clothing business in that neighborhood for approximately fifty (50) years, and the business was thereafter managed by her two sons (N. T. 117-118). Her premises are located directly across the intersection of Eighth and Filbert Streets from the Lit Brothers Department Store (operated by the respondent City Stores Company) and from the respondent Strawbridge & Clothier Department Store. Petitioner's store has been a substantial competitor to the wearing apparel segments of the respondent department stores (N. T. 119-121; 147-148).

On March 20, 1962, the Petitioner was served with the first formal notice that her property had been condemned by the Philadelphia Parking Authority for the construction of a five-story self-parking garage called the "Eighth and Filbert Streets Project". The garage will bridge both Eighth Street and Filbert Street, and will physically connect with the two department stores so as to provide direct access from the upper floors of the garage to the stores. Twenty-four thousand square feet of retail space is to be provided to the respondent department stores on the ground floor of the garage for their own use or for subleasing, and they have the right to construct basement space under the garage adjacent to their presently occupied basement space (pages 27-35 of Exhibit P-4; page 27 of Exhibit P-24). Pursuant to the lease between the Philadelphia Parking Authority and the two department stores (Exhibit P-24) dated as of January 1, 1962, the Parking Authority leased the proposed garage for a period to terminate on January 1, 2000, unless extended at the option of

the lessees to a term of fifty (50) years (pages 2 and 21 of Exhibit P-24). The rental consists of a debt service rental sufficient to pay the principal and interest on the bonds sold to pay for the acquisition and construction costs, an "authority rental" at an average of Twenty Five Thousand ($25,000.00) Dollars per year, and certain "excess rentals" (pages 4-8 Exhibit P-24). The lease provides that if the lessees are required to pay taxes assessed upon their leasehold interests in the parking project, those taxes would be offset against the Authority rentals (page 8 of Exhibit P-24). The department stores reserved the right to approve all prices to be paid for land acquired for the project, and if the land could not be acquired by purchase, then the Authority was to acquire any remaining land by condemnation "upon obtaining the written consent thereto by City Stores and Strawbridge & Clothier" (Exhibit P-22). The Authority further agreed not to compromise any claims on account of condemnation without securing the prior written consent of the stores (page 34 of Exhibit P-24). The bonds sold by the Parking Authority are guaranteed by the respondent department stores.

The genesis of the Eighth and Filbert Streets Project is that sometime prior to November 21, 1957, Lit Brothers (hereinafter called "Lits") approached the Philadelphia Parking Authority and informed it of Lits' desire to have a garage built north of the intersection of Eighth and Filbert Streets (N. T. 424). The proposed transaction was outlined in a memorandum introduced as Exhibit P-12 (N. T. 508-513), and the Lease finally concluded among the respondents meets virtually every condition set forth in that proposal.

In the Summer of 1959, the President of the Strawbridge & Clothier Department Store was informed of the proposal to construct the garage (N. T. 507). Thereafter, the plans were modified somewhat to provide more direct access to the Strawbridge & Clothier Department Store, and

to include Strawbridge & Clothier as a lessee of the garage and guarantor of the bonds.

On July 26, 1960 and on June 26, 1961, Agreements were entered into among the respondents outlining the garage and the financing proposals; authorizing the Parking Authority to acquire the necessary real estate at prices approved by the respondent department stores or, upon securing the consent of the respondent department stores, to acquire the balance by condemnation; providing for compensation of the attorneys for the Philadelphia Parking Authority out of the proceeds of the revenue bonds guaranteed by the department stores or, if the project were abandoned, to have those fees paid directly by the department stores; and agreeing that if the project be abandoned after property had been acquired by negotiation or condemnation, that the property would be conveyed by the Parking Authority to the respondent department stores (Exhibit P-22).

Although the Philadelphia City Planning Commission had issued a Central Business District Parking Study in 1958 (Exhibit P-2) recommending certain parking sites in order to meet the present and projected 1970 parking demand in Center City Philadelphia, and the City Planning Commission had issued a physical development plan for Center City of Philadelphia in 1960 (Exhibit P-5) again recommending specific parking sites, *neither of these studies recommended a parking garage at Eighth and Filbert Streets.*

The reason for this was revealed at trial. In the forty-five (45) block area surrounding the Eighth and Filbert Streets site, the Central Business District Parking Study projected a 1970 parking demand for six thousand five hundred and three (6,503) parking spaces (Exhibit P-2, at page 33), and in 1962, there already were between seven thousand one hundred and nine (7,109) and seven thousand four hundred and nine (7,409) available parking spaces in

that area. (See Requests for Findings of Fact Nos. 73 to 87, Appendix C hereto, *infra*, pages 57a-66a.) (The variation was due to construction of the Independence Mall Garage, which when completed would bring the total to seven thousand four hundred and nine (7,409) available parking spaces.)

In the more immediate eighteen (18) block area recommended for study by the surveys which the Parking Authority had prepared for itself in connection with the Eighth and Filbert Streets garage, the Central Business District Parking Study showed a 1970 projected demand of two thousand nine hundred and forty-three (2,943) parking spaces, and a 1962 availability of between three thousand six hundred and seventeen (3,617) and three thousand nine hundred and seventeen (3,917) parking spaces (see table attached as Appendix D, *infra*, page 116a).

Furthermore, the increased volume of vehicles which the studies showed would be drawn into the vicinity of 8th and Filbert Streets by the new garage (pages 13-14 of Exhibit P-3) would load the already overburdened streets beyond their "practical capacities" (as defined in the Highway Capacity Manual of the United States Bureau of Public Roads, pages 6, 71). (N. T. pages 256-269).

Petitioner instituted this Action in Equity on March 28, 1962 averring, inter alia, that the proposed condemnation was "an unlawful taking not for public purposes" in violation of her constitutional rights (Complaint in Equity, Par. 15, printed in Appendix C hereto, *infra*, at page 36a) and prayed that the proposed condemnation of her property and the proposed Lease and Agreements among the defendants be enjoined. Testimony was heard between June 11, 1962 and June 20, 1962; requests for Findings of Fact and Conclusions of Law were then submitted by both parties; and argument had before the Chancellor. Among the petitioner's requested Conclusions of Law (set out at length in Appendix C to this Petition, *infra*, page 88a) is requested Conclusion of Law No. 21 as follows:

"21. The taking of private property by the power of eminent domain for a private purpose, or for other than a public purpose, violates the Due Process Clause of the United States Constitution (*The Citizens Saving and Loan Association of Cleveland, Ohio v. Topeka City*, 20 Wall. 655, 87 U. S. 655, 22 L. Ed. 455)."

The respondents' requests for Findings of Fact and Conclusions of Law (Appendix C, *infra*, page 115a) joined issue thereon, their requested Conclusion of Law No. 4 being as follows:

"4. The condemnation by defendant Authority of plaintiffs' land and other land to be used for the public parking project was lawful and for a public use, and was not in violation of plaintiffs' Constitutional or other rights."

The central portion of petitioner's Brief on Request for Findings of Fact and Conclusions of Law devoted twenty-nine (29) pages to the heading:

"The power of eminent domain may not be exercised to take private property for the private use of another. Such a taking violates the Constitutions both of Pennsylvania and of the United States."

The first eight pages of respondents' answering Brief was in response to the said contention.

The Chancellor found in favor of the respondents and petitioner took Exceptions to those findings, specifically excepting to the refusal of the Chancellor to enter a Conclusion of Law in accordance with petitioner's request for Conclusion of Law No. 21, as set forth above. The Court en banc treated the contention at some length, concluding as follows (Appendix B, *infra*, page 22a):

> "Members of the community shop at these department stores. The project is designed to benefit shoppers, not just shoppers at these stores, and benefits to shoppers fall within the sphere of public benefits, and, therefore, the taking of properties to build a garage to benefit these shoppers is a taking for a public use. This Court, exercising its limited power of judicial review, finds that the Authority has not abused its discretion, and that the taking in the instant case is a taking for a public use."

From the decision of the Common Pleas Court, an Appeal was taken to the Supreme Court of Pennsylvania, again raising the violation of petitioner's constitutional rights because of the taking for a private rather than a public purpose. On October 11, 1963 in a Per Curiam Opinion (three of the seven members of the Court dissenting therefrom!) the Supreme Court considered that one of the questions before it was "that the condemnation was not a taking for a public use", and concluded simply that (Appendix B, *infra*, page 27a):

> "Our conclusion from a study of the instant factual situation and the law applicable thereto is that the Court below acted with propriety in entering this Decree."

A Petition for Reargument was filed within the time allowed by the Rules of the Pennsylvania Supreme Court, and the said Petition was dismissed on November 13, 1963.

REASONS FOR GRANTING THE WRIT.

1. The Condemnation of Petitioner's Property Is Not for a Public Purpose, and Therefore Is in Violation of the Due Process Clause of the Fourteenth Amendment.

Governmental power may not be exercised to take the property of one citizen and to bestow it upon favored individuals to aid private enterprises for personal gain.

In *The Citizens' Saving and Loan Association of Cleveland, Ohio v. Topeka City*, 20 Wall. 655, 87 U. S. 655, 22 L. Ed. 455 (1874), Mr. Justice Miller articulated clearly that such action ". . . is none the less a robbery because it is done under the forms of law . . ."

The simple truth expressed by this Court in 1874 is equally true today.

That truth is not beclouded because municipal attorneys, under the pressures of increasing concentrations of business power, have become more skilled in their manipulation of the "forms of law". A condemnation preceded by a fifty year lease of the Petitioner's condemned land, passing virtually all of the incidents of ownership to private lessees, is no less a robbery than an outright deeding of the land would be. Where the power of eminent domain is exercised simply to make it more convenient for patrons to park and shop in particular stores, it would seem clear that the guarantees of the due process clause have been violated. The taking of private land for construction of a factory [*Howard Mills Co. v. Schwartz Lumber & Coal Co.*, 77 Kan. 599, 95 P. 559, 18 LRA (NS) 356] or to build a private tramway [*Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487 (1913)] or for construction of an overpass to aid a department store [*Townsend v. Epstein*, 93 Md. 537, 49 A. 629, 52 LRA 409, 86 A. St. Rep. 441 (1901)] have all been struck down as unconstitutional condemnations.

Petitioner believes that the Due Process Clause of the Fourteenth Amendment still embodies the vital principle that private property may not be taken by governmental action simply for the benefit of private individuals. Petitioner does not contend that parking generally may not be a legislatively declared public use. Petitioner concedes that the power of eminent domain may be exercised in appropriate cases to take land for the construction of parking facilities. But Petitioner contends that this particular taking is so clearly designed to aid two private business enterprises that the taking may not be sustained by the device of using a public agency to enable the businesses to secure their private ends. The precise issue has not been recently decided by the Supreme Court. In *County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185, 3 L. Ed. 1163, 79 S. Ct. 1060 (1959) this Court held that a United States District Court should exercise its diversity jurisdiction to determine the factual question of whether in a given instance a private owner's land had been expropriated for a private rather than a public use. And in *Berman v. Parker*, 348 U. S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), this Court held that redevelopment of the District of Columbia was a "public purpose" for which Congress could properly exercise its police power, and that the provisions of the District of Columbia Redevelopment Act of 1945 were constitutional.

Petitioner submits that the law is as well stated in 2 *Nichols, Eminent Domain*, Third Edition (1950) 569 § 7.6:

> "It is well settled, as a general principal of law, that the power of eminent domain cannot be constitutionally employed to enable private individuals to cultivate their land or to carry on their business to better advantage, even if the prosperity of the community will be enhanced by their success." [Citing, inter alia, *Citizens S. & L. Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.]

See also *2 Cooley, Constitutional Limitations*, 1124 et seq., 8th Ed. (1927), and cases cited therein. The underlying authorities may be aged, but they are not infirm.

As early as *Wilkenson v. Leland et al.*, 27 U. S. (2 Pet.) 627, 658, 7 L. Ed. 543, 553 (1829), Mr. Justice Storey noted:

> "We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a Constitutional exercise of legislative power in any State of the Union. On the contrary, it has been consistently resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

More recently Mr. Justice Brandeis restated the basic principles in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 80, 81 L. Ed. 510, 524, 57 S. Ct. 364 (1937):

> "And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. See Hairston v. Danville & W. R. Co., 208 U. S. 598, 605, 606, 52 L. E. 637, 639, 640, 28 S. Ct. 331; Rindge Co. v. Los Angeles County, 262 U. S. 700, 705, 67 L. Ed. 1186, 1191, 43 S. Ct. 689. Compare Cincinnati v. Vester, 281 U. S. 439, 446, 449, 74 L. Ed. 950, 954, 956, 50 S. Ct. 360."

Neither a state nor a state agency may evade these basic constitutional guarantees under the guise of providing a modern convenience (in this case parking facilities for private automobiles). Parking per se is neither a public nor a private purpose: it is merely a use. It may be a public or private use depending upon all the relevant facts. There are hundreds of parking garages and lots in the City of Philadelphia, owned by private parties and operated by them as private businesses, just as there are food stores and

the multitude of other shops which supply the public with the necessities of life. All of them not only invite members of the public into their premises, but thrive and survive in proportion to their success in having members of the public use their facilities. Notwithstanding that members of the "public" use the facilities, they are clearly operated as private enterprises. In the instant case, the conception, the financing, the profit, the operation, and the entire benefit of the parking garage is by and for two private business corporations. The Parking Authority serves as a mere conduit in this instance.

The evidence of the non-public purpose to be served by taking of petitioner's property is overwhelming. The parking garage was first proposed by the Lit Brothers Department Store (N. T. 424). The proposal originally submitted by that store (Exhibit P-12) is virtually duplicated in the plan finally adopted by the Philadelphia Parking Authority (Exhibit P-24). The garage will be physically connected to the department stores operated by two of the respondents, and patrons of the stores will be able to pass unhindered to and from the upper floors of the stores to the upper floors of the garage (Page 27 of Exhibit P-24; Exhibit D at page 5 of Exhibit P-4; Exhibit A at pages 27-32 of Exhibit P-4). The department stores may advertise in the garage (Page 3 of Exhibit P-24). Twenty-four thousand (24,000) square feet of street level retail selling space is being provided for the department stores for their own use or their sub-leasing (Pages 27-35 of Exhibit P-4; Page 27 of Exhibit P-24). The entire garage is "leased" to the two department stores for up to fifty (50) years (Pages 2 and 21 of Exhibit P-24). Profits from the garage inure to the stores. The planning for the garage has been paid for by the stores. The bonds to pay for the condemnation are guaranteed by the stores and the rentals paid by the stores will discharge the bonds. Condemnation and purchase of the site is subject to the approval of the stores. Counsel for the Parking Authority will

even be paid directly or indirectly by the department stores.

There is not a single relevant piece of evidence establishing a public need for the parking facilities here involved. On the contrary, the statistical and expert evidence introduced clearly negates the existence of a public need for parking facilities near the site of the condemnation.

The only studies made of the general public parking needs in the relevant area show that the projected 1970 parking needs had already been significantly exceeded by recent garage and lot construction *prior* to this condemnation in 1962. These studies also revealed that the increased volume of vehicles attracted by the new garage would jam the already crowded streets considerably beyond their "practical capacities".

Despite the unchallenged evidence, the Trial Court concluded simply that:

> "Members of the Community shop at these department stores. The project is designed to benefit shoppers . . . and, therefore, the taking of properties to build a garage to benefit these shoppers is a taking for a public use."

How sharp a contrast with the language used by the Supreme Court of Maryland in the similar case of *Townsend, Grace & Co. v. Epstein*, 93 Md. 537, 49 Atl. 629 (1901)! There an Ordinance had been passed permitting a department store to construct a bridge across a public street to permit access to the store:

> "Was the ordinance under which the appellee here undertakes to justify the acts complained of passed to subserve a public purpose, or does it serve a more private purpose and private and individual interests? Upon the face of it, it seems to recognize the limitations upon the right and power of the municipality to pass ordinances of this nature by expressing its

object to be 'for the convenience of the public having business with Jacob Epstein.' This is a rather thin disguise. It is but another form of saying 'to promote the private business of Jacob Epstein and his convenience in respect thereto.' How does it serve the general public, or a public purpose, to facilitate Jacob Epstein, at the expense of his neighbors, in attracting customers to, and serving them at, his store? Aside from this, the proof makes it perfectly clear that only private interests are to be subserved by the privileges obtained under the ordinance in question . . ."

It would seem that the present case is precisely the one in the mind of the learned author who said, in 2 Nichols, *Eminent Domain*, *supra*, § 7.61[2]:

"Land cannot be taken by eminent domain for the site of a wholesale grocery, or *to aid in the successful carrying on of a department store*, although the taking is said to be for the convenience of the public doing business with the owner of the store [emphasis supplied]."

Here, the taking of Petitioner's land put Petitioner out of business! An extreme method of eliminating competition.

2. The Due Process Clause of the Fourteenth Amendment Is Violated Where the Court Below Refuses to Make an Independent Judicial Inquiry Into the Nature of a Condemnation and Simply Rubber-Stamps the Condemning Authority's Action.

Petitioner further contends that the narrowness of the judicial review applied in this case violated the standards of the due process clause of the Fourteenth Amendment. Petitioner had no real judicial review here. The court below merely rubber-stamped the Parking Authority's action.

At a minimum, Petitioner is entitled to a judicial review which will inquire into whether the uncontradicted and unchallenged facts warrant the conclusion that the taking was for a public purpose. This inquiry cannot be foreclosed by the condemning authority by the simple device of couching its action in broad conclusionary terms. A bare inquiry into the procedural correctness of the public agency's acts, and even a determination that there was no abuse of discretion, cannot acquit the examining Courts of their duty to ascertain whether the expropriation is in fact for a public purpose. The inquiry into whether a taking is for a public purpose and hence constitutional is a judicial inquiry, and should not be foreclosed by administrative agency action.

As Chief Justice Hughes declared in *City of Cincinnati v. Vester*, 281 U. S. 439, 446, 74 L. Ed. 950, 955, 50 S. Ct. 360 (1930).

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question of what is a public use is a judicial one. In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. *But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution.*" [Emphasis supplied.]

Despite these clear and controlling admonitions, the Trial Court shackled its inquiry. It concluded:

> "This Court, exercising its *limited power of judicial review*, finds that the Authority has not abused its discretion, and that the taking in the instant case is a taking for a public use." [Emphasis supplied.]

And the Pennsylvania Supreme Court, in a curious "Per Curiam" Opinion[1] simply determined that "the Court below acted with propriety." The reluctance of the Pennsylvania Supreme Court to uphold the administrative agency action is apparent.

So limited a judicial inquiry does not meet the requirements of the Fourteenth Amendment. The relevant inquiry is whether the taking is in fact for a public purpose. The inquiry is not satisfied by a statement that the *Parking Authority* has determined that the taking is for a public purpose. It is no more satisfied by the vague conclusion that the Parking Authority "has not abused its discretion". The question here is not one of discretion. It is a question of law—and the most sacred constitutional law, at that.

There is nothing sacrosanct about the Philadelphia Parking Authority or its conclusions. The Authority is merely a non-elective quasi-public administrative agency. Its determinations are administrative. The determination of public purpose, however, is a *judicial inquiry*. That inquiry is not limited to what the Authority said. It is broad and searching. The actual facts must be looked into, as distinguished from the self-serving declarations of the administrative agency whose actions are being challenged on basic constitutional grounds. In *2 Cooley, Constitutional Limitations*, 8th Ed. (1927) 1131, the breadth of the judicial inquiry is noted:

> "The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar

1. The only Per Curiam Opinion known to counsel for petitioner in which that Court had in fact split four to three.

character, and the difficulty—perhaps impossibility of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide."

Moreover, the administrative procedure followed in this case in no way established the operative facts, the existence of which are a *sine qua non* to the constitutional exercise of the power of eminent domain.

The Philadelphia Parking Authority did not hold public hearings. It made no findings of fact in this case. The Executive Director of the Authority testified in depositions that in the five years he had been Executive Director, no member of the public (other than persons bidding on a specific project) had ever attended a Parking Authority meeting. The minutes of the Authority (Exhibit P-26) merely reflect corporate actions taken to condemn land and to enter into the lease with the department store respondents. Nowhere in the record is there a scintilla of evidence to support the ultimate in challenged governmental actions: the taking of A's property to serve B's private purposes.

The taking in this case should be distinguished from takings by Redevelopment Agencies or similar Urban Development agencies.

Here there is no *legislative* finding of blight or need. Here there is no concern with broad planning or neighborhood improvement. Here there were no public hearings. Here there is no action by a popularly elected body.

Under the Redevelopment Law, before private land may be taken by eminent domain, a plan must be drafted by the City Planning Commission, proposals for implementation must be developed and approved by the local Redevelopment Authority, the plans and proposals must be submitted to the City Council in the form of legislation, public hearings must be advertised and owners of land to be affected given the opportunity to appear before their legis-

lators, affirmative action by the City Council is required with regard to each specific plan or redevelopment area, the Mayor is given the opportunity to veto or approve, and the matter then submitted to the Federal Government for additional scrutiny—only then is the Redevelopment Authority in a position to exercise the power of eminent domain.

The Parking Authority acts without these essential safeguards to protect private citizens. No public hearings are required. And no public hearings were held by the Parking Authority with regard to the 8th and Filbert Streets site.

Here a private deal was worked out between the Parking Authority and two private stores, the stores agreed to guarantee funds to pay for the condemned property and to assure a profit to the Authority, and the Authority in private session condemned petitioner's land.

Without making the judicial inquiry demanded by the Due Process Clause, the state courts simply rubber-stamped the Authority action on the ground that parking generally may be a public purpose. It is submitted that petitioner was entitled to a judicial determination of whether *this* particular taking was for a public purpose. Is the construction of the 8th and Filbert Street Garage a public purpose? The mere fact that members of the public might use the facility does not make it a public use. Virtually all private enterprises depend on public usage in order to prosper. The relevant judicial inquiry should have concerned the public need to be met by *this* exercise of the police power, and whether *this* taking will meet that need.

Here, the relevant evidence clearly shows that in the neighborhood of the condemned property, there was already a significant surplus of available parking spaces. It was further demonstrated that the proposed garage would *increase* rather than *decrease* traffic congestion in the neighborhood of 8th and Filbert Streets.

No public need is to be served by the taking in question. The only need to be served is to provide parking for two downtown department stores. To lend certain department stores the State's power of eminent domain to accomplish what others must do by traditional means under the Constitution, violates the basic concept of a free and competitive society.

A broad judicial review of the nature of this taking would have resulted in striking the action down. By limiting judicial review in this case and looking only to abuse of discretion", the state courts denied Petitioner her right to the due process guaranteed her by the Fourteenth Amendment.

3. Conclusion.

It is conceded that traditional conceptions of private property rights must regularly undergo re-evaluation in the light of contemporary problems. This process may not, however, result in their elimination. The right of one private citizen not to be deprived of his private property for the benefit of another private person is a basic one guaranteed by the Fourteenth Amendment.

Prior to March of 1962, petitioner's business competed vigorously in the clothing business with its two neighbors directly across Filbert Street and across Eighth Street from her property. Her sons then, as their late father before them, had been in that business at that location.

After the implementation of the agreement among the respondents, petitioner's property was taken, and a garage and even retail selling space is to be constructed where her store had been before, to serve the customers of the respondent stores. Had one of the two department stores succeeded in agreeing with the Parking Authority to condemn the other for a similar purpose, the cries would have been heard in the most distant galaxies. By combining, they have served their common purpose at the expense of a weak and defenseless competitor.

This is precisely the kind of fundamental unfairness that cries for correction by this Court. Petitioner submits that the Fourteenth Amendment means what it says. We submit that petitioner's property may not be seized and her business disrupted to benefit her two giant competitors.

To sustain the validity of that principle, and to prevent a gross infringement of petitioner's private property rights, it is respectfully prayed that Your Honorable Court allow a Writ of Certiorari to issue in this case.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 6, 1964.

APPENDIX "A".

Excerpts From Parking Authority Law.

§ 342. Findings and Declaration of Policy.

It is hereby determined and declared as a matter of Legislative finding:

(a) That residential decentralization in cities of the first, second, second A and third classes, boroughs, and townships of the first class has been accompanied by an ever increasing trend in the number of persons entering the business sections by private automobile as compared with other modes of transportation;

(b) That the free circulation of traffic of all kinds through the streets of cities of the first, second, second A and third classes, boroughs, and townships of the first class is necessary to the health, safety and general welfare of the public whether residing in the city, borough, or township of the first class, or traveling to, through or from the city, borough, or township of the first class in the course of lawful pursuits;

(c) That the greatly increased use by the public of motor vehicles of all kinds has caused serious traffic congestion on the streets of cities of the first, second, second A and third classes, boroughs, and townships of the first class;

(d) That the parking of motor vehicles on the streets has contributed to this congestion to such an extent as to interfere seriously with the primary use of such streets for the movement of traffic;

(e) That such parking prevents the free circulation of traffic in, through, and from the city, borough, or township of the first class, impedes rapid and effective fighting of fires and the disposition of police forces in the district and endangers the health, safety and welfare of the general public;

(f) That such parking threatens irreparable loss in valuations of property in the city, borough, or township of the first class which can no longer be readily reached by vehicular traffic;

(g) That this parking crisis, which threatens the welfare of the community, can be reduced by providing sufficient off-street parking facilities properly located in the several residential, commercial and industrial areas of the city, borough, or township of the first class;

(h) That the establishment of a parking authority will promote the public safety, convenience and welfare;

(i) That it is intended that the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;

Therefore it is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the safety and welfare of the inhabitants thereof by the creation in first, second, second A and third class cities, boroughs, and townships of the first class of bodies corporate and politic to be known as "Parking Authorities" which shall exist and operate for the purposes contained in this act. Such purposes are hereby declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain. 1947, June 5, P. L. 458, § 2; 1949, May 9, P. L. 969, § 2; 1951, May 10, P. L. 291, § 2.

§ 345. Purposes and Powers; General.

(a) The Authority, incorporated under this act, shall constitute a public body corporate and politic, exercising public powers of the Commonwealth as an agency thereof, and shall be known as the Parking Authority of the city,

borough, or township of the first class, but shall in no way be deemed to be an instrumentality of the city, borough, or township of the first class or engaged in the performance of a municipal function. The Authority shall be for the purpose of conducting the necessary research activity, to maintain current data leading to efficient operation of off-street parking facilities, for the fulfillment of public needs in relation to parking, establishing a permanent coordinated system of parking facilities, planning, designing, locating, acquiring, holding, constructing, improving, maintaining and operating, owning, leasing, either in the capacity of lessor or lessee, land and facilities to be devoted to the parking of vehicles of any kind: Provided, however, That the Authority shall not have the powe. to engage in the sale of gasoline, the sale of automobile accessories, automobile repair and service, or any other garage service and shall not engage in the sale of any commodity of trade or commerce.

The Authority shall have the power to lease portions of the street level or lower floors of the parking facilities for commercial use, including emergency automobile repair service, and the sale, by the lessee, of any commodity of trade or commerce or any service, except the sale of gasoline or the sale of automobile accessories, where; in the opinion of the Authority, such leasing is desirable and feasible in order to assist in defraying the expenses of the Authority. Such leases shall be granted on a fair competitive basis.

Nothing herein contained shall be construed to prohibit the sale or leasing by the Authority of the right to occupy and use the space above any parking facility for commercial uses other than parking (except the sale of gasoline or the sale of automobile accessories), together with the right to use and occupy such space within the parking facility as may be necessary for the purposes of access to and support of structures occupying the space above such parking facility. As amended 1961, Sept. 2, P. L. 1229, § 1.

§ 349. Acquisition of Lands.

The Authority shall have the power to acquire by purchase or eminent domain proceedings either the fee or such rights, title, interest or easement in such lands, as the Authority may deem necessary for any of the purposes mentioned in this act: Provided, however, That no property devoted to a public use, nor any property of a public service company, property used for burial purposes, places of public worship, nor property which at the date when this act became effective, with respect to such city, borough, or township of the first class, is used as a facility or facilities for the parking of motor vehicles, so long as said property is continuously so used, and so long as the operation of the said facility complies with parking and traffic ordinances of the city, borough and township of the first class shall be taken under the right of eminent domain. The right of eminent domain shall be exercised by the Authority in the manner provided by law for the exercise of such right by cities, boroughs and townships of the first class in which the Authority exists: Provided, That the viewers may take into consideration, and may assess damages for expenses incurred for the removal of fixtures, equipment and merchandise.

The right of eminent domain herein conferred by this section may be exercised only within the city, borough and township of the first class.

Court proceedings necessary to acquire property or property rights, for purposes of this act, shall take precedence over all causes not involving the public interest in all courts to the end that the provision of parking facilities be expedited. 1947, June 5, P. L. 458, § 10; 1949, May 9, P. L. 969, § 5; 1951, May 10, P. L. 291, § 4; 1953, Aug. 19, P. L. 1106, § 3.

APPENDIX "B".

COURT OF COMMON PLEAS No. 5.

March Term, 1962. No. 1626.

In Equity.

FRANCES H. SELIGSOHN AND EXPORT-IMPORT CLOTHING CO.

v.

THE PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY AND STRAWBRIDGE AND CLOTHIER.

ADJUDICATION.

Plaintiffs' complaint seeks equitable relief preventing the Philadelphia Parking Authority from condemning the land owned by plaintiff Seligsohn and from performing under the terms of a lease entered into with City Stores Company and Strawbridge and Clothier. Defendants answered and set forth New Matter; plaintiffs replied. The matter came on for hearing and after consideration of the pleadings and the testimony adduced, the Chancellor makes the following

FINDINGS OF FACT.

1. Plaintiff Frances H. Selig-sohn is a resident of the City of Philadelphia and the owner of a lot and building at

the northeast corner of Eighth and Filbert Streets (35-37 North Eighth Street), Philadelphia, Pennsylvania (hereinafter called "plaintiff's premises").

2. Plaintiff Export-Import Clothing Company is a Pennsylvania corporation engaged in the sale at plaintiff's premises of relatively inexpensive new and used men's, women's and children's wearing apparel.

3. Defendant The Philadelphia Parking Authority (hereinafter called "defendant Authority") is a body corporate and politic, created, existing and acting under the Parking Authority Law of the Commonwealth of Pennsylvania (Act of June 5, 1947, P. L. 458, as amended), and an ordinance of the Council of the City of Philadelphia approved on January 11, 1950.

4. Defendant City Stores Company is a Delaware corporation with its principal office in New York City, New York, and owns and operates Lit Brothers Department Store at Eighth and Market Streets, Philadelphia, Pennsylvania.

5. Defendant Strawbridge and Clothier is a Pennsylvania corporation with its principal place of business at 801 Market Street, Philadelphia, Pennsylvania, at which it operates a department store.

6. Plaintiff Frances H. Seligsohn is the President and sole owner of all of the shares of stock of plaintiff Export-Import Clothing Co.

7. Plaintiff Export-Import Clothing Co. occupies, and conducts its business at, plaintiffs' premises as lessee under a lease from plaintiff Frances H. Seligsohn, as lessor. The term of that lease is for a period of five years commencing in 1959.

8. The public parking project is estimated to cost approximately $4,500,000.00.

9. Wilbur Smith and Associates is a firm that is a qualified and competent consultant and specialist in the field of parking and traffic.

10. In 1957-58, Wilbur Smith and Associates prepared for, and submitted to, the Philadelphia City Planning Commission a two-volume general parking study entitled "Parking Study, Central Business District, Philadelphia, Pennsylvania".

11. The survey area covered by that Study includes the entire Philadelphia central business district bounded by Spring Garden Street on the north, Delaware River on the east, South Street on the south, and the Schuylkill River on the west.

12. Within that survey area is designated a "core" area bounded essentially by Arch, Seventh, Locust, and Eighteenth Streets.

13. The public parking project is located within that "core" area.

14. Volume I of that Study was submitted to the Philadelphia City Planning Commission on September 16, 1957. It covers and is sub-titled "1958 Parking Demands and Needs".

15. Volume 2 of that Study was submitted to the Philadelphia City Planning Commission on July 24, 1958. It covers and is sub-titled "1970 Parking Demands and Needs".

16. In 1957 or 1958, and as a result of that Study, Wilbur Smith and Associates prepared for, and submitted to, the Philadelphia City Planning Commission, a preliminary review of nine potential parking sites.

17. The Preliminary Review specifically mentions a suggested "7th and Filbert Streets Site", almost the same as the site selected.

18. A public parking authority, by its nature, is required to establish facilities which will sustain revenue bonds so that it will be financially independent of the Government with which it is related.

19. Revenue bonds of a public parking authority, without additional security, are not readily saleable.

20. The basic concept for financing the public parking project through a lease with department stores and revenue bonds secured thereby; came from two similar successful public parking projects in Pittsburgh, Pennsylvania involving the Pittsburgh Public Parking Authority, and the May Company (which operates the Kaufmann Department Store), and Joseph Horne's Department Store.

21. In September, 1957, the entire public parking program of defendant Authority could be described as being in a state of dormancy; upto that time, defendant Authority had developed and built but two garages.

22. In September, 1957, the Mayor of the City of Philadelphia appointed a new (the present) Chairman and Vice-Chairman, and told them that he wanted a more energetic public parking policy pursued, and asked them to start quickly an energetic program.

23. The then (the present) Vice-Chairman of defendant Authority had been for a number of years a member of the Pittsburgh Public Parking Authority, and had worked on, and was familiar with those two projects, and the Mayor of Philadelphia was familiar with that work.

24. Accordingly, defendant Authority (acting by and through its then and present Chairman and Vice-Chairman) began to work on developing a parking garage system in center city Philadelphia based on leases with department stores.

25. Subsequently, representatives of all three defendants had a preliminary meeting and subsequently many further meetings and conferences regarding the public parking project.

26. As a result of those meetings and conferences, Wilbur Smith and Associates, and National Garages, prepared and submitted respectively the Analysis and Parking Study referred to in findings 27 and 29 hereinbelow.

27. Wilbur Smith and Associates prepared for, and submitted to, defendants City Stores Company and Strawbridge and Clothier an analysis which covers and is entitled "Economic Analysis, Proposed Parking Garage at Arch, Eighth and Filbert Streets, Philadelphia, Pennsylvania".

28. National Garages, Inc. is a company that is expert in the parking field, specializes in parking consultations, and operates numerous parking facilities.

29. National Garages, Inc. prepared for, and submitted on January 6, 1961 to, defendant Authority a parking study which is entitled and covers "Parking Study for Philadelphia Parking Authority, Eighth Street Parking Project".

30. All of those Studies and Analyses of Wilbur Smith and Associates and National Garages, Inc. were prepared and submitted before the lease was executed.

31. As a further result of those meetings and conferences, all three defendants executed among themselves two preliminary agreements (hereinafter called "pre-lease agreements"). One pre-lease agreement is dated July 26, 1960, as amended by a supplementary agreement dated September 13, 1960; the other pre-lease agreement is dated June 26, 1961, as amended and supplemented by an amending and supplementary agreement dated September 6, 1961.

32. The pre-lease agreements were directed generally to staging the various preliminary phases of the public

parking project, including temporary financing, and identifying certain terms to be set forth in the lease (in the event that the lease were ever executed).

33. Certain provisions of the pre-lease agreements terminated prior to or upon the execution of the lease; certain other provisions of the pre-lease agreements survived the execution of lease.

34. On or about March 1, 1962, the three defendants entered into among themselves and executed a certain lease agreement dated as of January 1, 1962, under the terms of which defendant Authority was lessor and defendants City Stores Company and Strawbridge and Clothier were lessees.

35. The lease was basically the product of negotiations among the defendants and Drexel and Company, the financing institution that set up the bond issue and arranged for the sale of the bonds.

36. The premises leased under the lease (i.e., the public parking project) are bounded approximately as follows: on the north by the south side of Arch Street; on the south by the south side of Filbert Street east of Eighth Street, and by the north side of Filbert Street west of Eighth Street; on the east by an imaginary line extending from Arch Street to Filbert Street, approximately 140 feet east of Eighth Street; and on the west by an imaginary line extending from Arch Street to Filbert Street, approximately 100 feet west of Eighth Street.

37. Under the terms of the lease, the public parking project, to be constructed by defendant Authority, was leased by defendant Authority as lessor, to defendants City Stores Company and Strawbridge and Clothier, as lessees. Lessees agreed to operate the project as a public parking facility.

38. The public parking project will be self-parking, and will have a capacity of approximately 950 cars.

39. The public parking project will be accessible to the public from the street through six entrances at street level, and will also be accessible by being physically connected to Lits Department Store, Strawbridge and Clothier's Department Store, and will bridge Eighth Street from Filbert to Arch Streets.

40. Approximately 24,000 square feet of space within the public parking project will be available to lessees or their sublessees for commercial or other purposes in accordance with the terms of the lease, on the ground floor along both sides of Eighth Street from Arch to Filbert.

41. Title to the public parking project will be in defendant Authority, and ultimately vest in the City of Philadelphia.

42. The public parking project is to be financed entirely through revenue bonds of defendant Authority, and without cost to the City of Philadelphia or defendant Authority.

43. On or about February 28, 1962, defendant Authority and the Provident Tradesmens Bank and Trust Company, as Trustee, entered into and executed a Trust Indenture dated as of January 1, 1962 covering an initial issue of four million five hundred thousand dollars ($4,500,000.00) principal amount of defendant Authority revenue bonds to finance the public parking project.

44. The security for the bonds is the obligation of defendants City Stores Company and Strawbridge and Clothier under the lease.

45. Bonds of defendant Authority, unsupported by the obligation of two lessees of high financial standing (i.e., defendant City Stores Company and Strawbridge and Clothier) under the lease as security, would not have been saleable.

46. The credit and earning power of defendant Authority would not have been sufficient to support the sale of the bonds.

47. On May 9, 1962 the City of Philadelphia's Zoning Board of Adjustment issued to defendant Authority a use permit for the construction of the proposed public parking facility.

48. On February 23, 1962, defendant Authority adopted a resolution condemning properties in the vicinity of and to the north of Eighth and Filbert Streets for the purpose of acquiring land for the public parking project. On March 6, 1962, defendant Authority filed a Petition and Rule as of Philadelphia Common Pleas Court No. 3, December Term, 1961, No. 4618, for leave to File a Bond.

49. Part of the land so condemned is the plaintiffs' land.

50. As a result of the condemnation, title to all the condemned property, including the plaintiffs' land, is vested in defendant Authority.

51. Defendant Authority has settled for a majority of owners (in numbers, value and area), of the condemned land.

52. Defendant Authority has entered into a contract for the demolition of existing structures on the condemned land, and demolition under that contract is under way.

53. Defendant Authority has approved plans and specifications for the public parking project, which at the time of trial were out for bids and scheduled to be considered for awards by defendant Authority on June 28, 1962.

54. Construction of the public parking project is scheduled to be completed in ten months and be ready for

use by the public at the height of the very heavy business season in the following fall.

55. Defendant Authority is in the process of acquiring possession of all the condemned land.

56. Revenue bonds of defendant Authority in the amount of four million five hundred thousand ($4,500,000.00) dollars went on the market on January 1, 1962, were sold during the month of February, 1962, and delivered on March 1, 1962.

57. Drexel and Company is engaged in the business of investment banking, and undertook to set up the bond issue and arrange for the sale of the bonds under the trust indenture.

58. Funds in the amount of $4,500,000.00 received from the sale of those revenue bonds have been deposited with and are in the possession of the trustee, with interest running in accordance with the trust indenture, and have been and are being used to pay for the acquisition of land and other expenses in connection with the public parking project.

59. It was brought to the attention of plaintiff Export-Import that space was then available to it for the relocation of its business either on the ground floor of the proposed public parking project itself, or at a nearby location at 834 Arch Street, but plaintiff Export-Import gave no consideration to, and was not interested in, relocation.

DISCUSSION.

Plaintiffs have attacked the decision and action of the Authority in several particulars. Specifically they assert that the Authority exceeded its power, that its decision was taken in bad faith, and that the condemnation of the plaintiffs' property constitutes a taking for a private rather than a public use. The condemnation must therefore be

restrained as well as the performing under the lease arrangement with the two defendant stores.

The argument that the Authority exceeded its power rests on the proposition that the Authority may act only when its purpose is to remove automobiles which are using the public highways as a garage. The argument continues that if there is no congestion, i.e., parking on the streets, then there is no situation for the exercise of the power conferred on the Authority. All will concede, as indeed they must, that for all practical purposes there is no on-street parking in this area.

In Section 2 of the Parking Authority Law of 1947, 53 P. S. 342(a), (b), (c), (d) and (e), the legislative findings refer specifically to the problems created by on-street parking and the hazard of such congestion when it impedes the passage of fire, police and other vehicles primarily concerned with public safety. If the legislature had stopped at that point, plaintiffs' argument would have more cogency.

But the Act continues and in sub-sections (g), (h) and (i) of the same Section 2, declares that the welfare of the community will be served by providing off-street parking and that the authorities should cooperate with existing facilities so that private enterprise and government "may mutually provide adequate parking services for the convenience of the public".

In Section 5(a) the legislature declared that "The Authority shall be for the purpose of . . . fulfillment of the public needs in relation to parking . . . ". The foregoing indicates that the legislature recognized that the necessity for providing parking facilities has become an overriding one. That it is one in which government must act for the benefit of the entire community; that the health, safety and general welfare will be served and promoted by governmental action in this area; that action is not limited to areas where congestion results from on-street parking alone.

One need not be an expert to realize that the so-called "core area" of the City of Philadelphia has suffered and

will continue until adequate facilities are provided for auto parking. It is as clear as clear can be, that as the major businesses of the core decline, so also do property values and tax receipts. One need not be an expert to conclude that if the economic vitality of the core is promoted and expanded the welfare of the entire community will be promoted.

There is an intimation, although not a charge as such, that the action of the Authority with the two department stores is in the nature of a conspiracy to remove plaintiffs' competition to Lit Brothers and Strawbridge and Clothier. This is a rather far fetched insinuation without a scintilla of evidence to support it.

It is true that the stores paid some of the initial expenses prior to consummating the transaction about which complaint is made. But the expenses entailed were for the purpose of determining the feasibility of the project with particular reference to the guarantee of the Authority's bonds which would be required.

The inability to sell the bonds of the Authority on the basis of anticipated revenue was the reason the participation of the stores was absolutely essential. Hence, the stores could not be expected to pledge their credit for approximately four and one-half million dollars without a study of the facts. This act of prudence removes all possible sinister implications of the prelease arrangements.

The mere fact that the stores will derive some benefit does not convert this project into a public taking for a private use. Thus as was indicated in Dornan v. Philadelphia Housing Authority et al., 331 Pa. 209, the fact that only a segment of the public derives benefits does not convert the use into a private use. The benefits of this garage will redound to the entire community and will assist in completing a comprehensive plan for off-street parking.

Actually plaintiffs attack the decision of the Authority to locate the garage at this site. If the garage were constructed at a location which would not disturb plaintiffs,

there would be no complaint. It has been frequently said that the wisdom of the decision is not for the Courts since the determination of the site depends on many variables, projections and predictions. The Authority has had a wide range of discretion given to it by the enabling statute. Nine Ten Chestnut Corp. v. Philadelphia Parking Authority, 373 Pa. 271. We cannot substitute our judgment for that of the Authority.

The language of Mr. Justice Arnold in the Nine-Ten Chestnut Corp. case, supra, at page 277, is apposite:

> "The present suit is nothing less than an effort to amend the statute by requiring the Authority to litigate every single exercise of its discretionary function."

The conclusion seems inescapable that the Authority has not acted in bad faith, has not exceeded the powers granted and has not abused its discretion in selecting this site or in making the financial arrangements that it has. The Authority has been specifically empowered ". . . . to make such agreements with the purchasers or holders of such bonds, or with others in connection with such bonds, . . . as the Authority shall deem advisable . . . .". 53 P. S. 345(b)(9).

Thus in the face of the demonstrated need for the facility, the Authority has been fortunate in being able to manage and set up this transaction with the assistance of the two department stores. The conclusion that this action was not directed at plaintiffs is indicated by the fact that the Authority was interested in obtaining the assistance of other department stores as well, both for this site and other proposed sites. The Authority is attempting to solve an acute and vexatious problem, of which all are aware.

The mass of statistical data produced by the various surveys and studies lends itself to many possible conclusions. Although the need for the facility is quite obvious from careful consideration of the reports. But, the conclu-

sions based on the figures depend primarily on what conclusion an interested party seeks. Hence, this situation is clarified by the factor that the opinion of the studies and surveys is not binding, it is only advisory. Eways v. Reading Parking Authority, 385 Pa. 592. The Authority bears sole responsibility for its decisions. Plaintiffs' efforts to destroy the opinions in the surveys again attacks the wisdom of the decision of the Authority. As previously noted, that question is not justiciable. Eways v. Reading Parking Authority, supra. Blumenschein v. Pittsburgh Housing Authority, 379 Pa. 566.

Plaintiffs have attacked the rate fixing power in the lease on the ground that the rates cannot be changed without the consent of the lessees; the two stores. This argument was answered adversely to plaintiffs' position in Clark v. Public Parking Authority of Pittsburgh, 372 Pa. 481, and therefore merits no further consideration.

Plaintiffs' complaint alleges that the Act prohibits the sale of any commodity of trade or commerce in parking garages erected by the Authority and that the arrangement for retail space is illegal. The Authority itself is prohibited from engaging in the sale of any commodity of trade or commerce, but plaintiffs have overlooked the fact that the Authority has been expressly empowered to lease portions of the street level or lower floors for commercial use for the sale of any commodity of trade or commerce. 53 P. S. 345(a).

In the instant case a certain amount of space has been designated "retail area" for use by the lessees or by sub-lessees. The Act provides for such leases to be on a fair competitive basis. However, we do not think that it applies to this situation because the lessees manifestly have a fundamental interest in the integrity and ability of any possible sub-tenants. Clark v. Public Parking Authority of Pittsburgh, supra. The conclusion obtains greater validity from the fact that the two defendant lessees have a financial stake in the repayment of the bonds.

Appendix "B"

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the parties and subject matter.

2. The defendant Parking Authority has condemned real estate for a public use.

3. The defendant Authority has not exceeded its power.

4. The defendant Authority is not guilty of acting in bad faith nor has it committed an abuse of discretion.

5. The Authority has power to enter into the leasing and financial arrangements that it has made.

6. Plaintiffs have not established the right to relief.

ORDER.

AND NOW, to Wit, this 26th day of September, 1962, it is Ordered, Adjudged and Decreed that the Court enter the following

DECREE NISI.

AND NOW, this 26th day of September, 1962, plaintiffs' complaint is dismissed.

The Prothonotary is directed to give notice to the parties or their counsel of the filing of this decree nisi and unless exceptions thereto are filed within twenty days from the date hereof, this decree shall become a final decree.

(sgd.) ALESSANDRONI, *P. J.*

COURT OF COMMON PLEAS NO. 5

MARCH TERM, 1962. No. 1626.

IN EQUITY

FRANCES H. SELIGSOHN AND EXPORT IMPORT CLOTHING CO.

v.

THE PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY AND STRAWBRIDGE & CLOTHIER.

OPINION

REINEL, *J.*

The matter before the Court involves the consideration of Plaintiff's Exceptions to the Chancellor's Adjudication. There are numerous exceptions, and rather than consider them individually, we will discuss the exceptions in four groups: (1) the Parking Authority Law does not authorize condemnation of private property except for parking projects which will relieve traffic congestion; (2) the proposed condemnation is a taking for private rather than public purposes; (3) the lease among the defendants is not in accordance with the Parking Authority Law; and (4) the Court erred in some of its rulings on evidence and in some of its rulings relating to discovery.

The Plaintiff's first two contentions are clearly without substance. The Supreme Court has declared in regard to these two issues that

> "What the court holds, therefore, is that where, as here, the contemplated use of property is in aid of,

and ancillary to the exercise of the police power, the public nature of such use is conclusively determined, and therefore the state may, where the use of the highways is hampered by a local lack of parking facilities, authorize the municipal acquisition and operation of publicly owned and operated parking facilities reasonably calculated to alleviate that condition." Masonic Temple v. Fitzherbert et al., 305 Pa. 364, 371-72, 157 A. 744.

It is clear that the police power includes the power to provide parking facilities where there are at the present time no facilities and where there is a need for such facilities. The police power is not limited to the relief of traffic congestion. In the statement the Supreme Court also declared that the law of this State is that a taking to provide parking facilities where those facilities are needed is a taking for a public use rather than a private use.

In order to appreciate whether a particular taking is a taking for a public use, it is necessary to understand the purpose of the Parking Authority Law. The Supreme Court has declared that the purpose is to study the public needs in relation to parking and to establish a coordinated system of parking facilities by acquiring, improving, maintaining and operating land and facilities to be devoted to the parking of all kinds of vehicles.

Masonic Temple v. Fitzherbert et al., 305 Pa. 364, 371. In the instant case parking facilities are being provided that will enable shoppers conveniently to drive to park at and shop in the centrally stores. In accomplishing this many parking stores have had to be condemned. This is, of course, a great hardship. But no gains come without losses. In the instant case the Plaintiff can offset some of his loss by accepting a tenancy in the new building that will be constructed on this site. But the Plaintiff will still suffer some disadvantage in being forced to move.

This Court is empowered in assessing the Plaintiff's resultant loss compared with the manifold gains of an as-

reviewing authority. This Court is not empowered to make the initial decision nor even to remake the decision: The Authority is given wide discretion to choose the location of parking garages, and the courts are not empowered to review that discretion unless it is clearly an abuse of discretion: *Nine-Ten Chestnut Corp. v. Philadelphia Parking Authority*, 373 Pa. 274 (1953). Even if this Court believed that a different site would be preferable, the Court cannot substitute its judgment for that of the Authority: *Blumenschein v. Pittsburgh Housing Authority*, 379 Pa. 566 (1954):

> It may be true that the Plaintiff is not benefiting from the proposed garage, but every member of the community need not benefit in order for a proposed project to involve a taking for a public use: *Darnall v. Philadelphia Housing Authority*, 331 Pa. 209, 222 (1938). We are not degrading the Plaintiff's loss, which may be considerable, but we must not lose sight of the obvious gains to be derived from this project.

There is a great need for additional parking facilities in center city. These parking facilities should be near the "generators" (large concerns drawing people to that particular location) so that people can conveniently travel to their destinations. The proposed garage will provide modern and convenient parking spaces at reasonable rates. The rates are designed so that the garage will primarily, as a matter of policy, encourage short-time parking rather than all-day parking. Finally, this site was chosen after considering extensive surveys which indicated that the project in question is needed, desirable and economically feasible.

The Plaintiff is disturbed by the fact that many features of this project indicate that the Parking Authority is acting in close cooperation with the other two defendants, who are two large department stores located in center city. In fact, this project may have been originally proposed by one of the defendants. But the source of a beneficial idea should not result in its debasement. Furthermore, direct

causeways are going to be constructed leading from the parking garage to the two "generators", the two department stores. Signs indicating the direction to the department stores will be hung, and, of course, they will be needed. Several other features of this project are similarly designed to benefit in particular these two department stores. But, at this point, the Court is faced, as is the Plaintiff, with one of the harsh and unwelcome realities of contemporary economics. Without the cooperation of the department stores, there could be no project. The Parking Authority, for reasons which we need not consider, is unable to finance this project itself.

Members of the community shop at these department stores. The project is designed to benefit shoppers, not just shoppers at these stores, and benefits to shoppers fall within the sphere of public benefits, and, therefore, the taking of properties to build a garage to benefit these shoppers is a taking for a public use. This Court, exercising its limited power of judicial review, finds that the Authority has not abused its discretion, and that the taking in the instant case is a taking for a public use.

The Plaintiff's third contention is that the lease in the instant case is not in accordance with the provisions of the Parking Authority Law. The Plaintiff contends that a leasing of portions of the parking garage for commercial use when the lease is not granted on a fair competitive basis is a violation of Sec. 5(a) of the Parking Authority Law. This contention has been conclusively determined contrary to the plaintiff's position in *Clark v. Public Parking Authority of Pittsburgh*, 372 Pa. 481 (1953). The Plaintiff's other contention is that the surrender of the right exclusively to fix and alter rates at the proposed public parking garage violates Sec. 5(b)(8) of the Parking Authority Law. This issue also has been determined contrary to the Plaintiff's contention in *Clark v. Public Parking Authority of Pittsburgh* (supra). On page 484, the Supreme Court answered both of these contentions:

"The plaintiff contends that the sublease is void since it was effected by private negotiation without competitive bidding . . . Nowhere is it stated that there must be competitive bidding *for the privilege of becoming a subtenant*. In the absence of such a provision the Authority's right to privately negotiate would be unquestioned. Indeed such practice would appear to be essential." (The Supreme Court's italics.)

"The plaintiff also contends that the Authority has improperly delegated its duty to regulate rates. But under Section 13 of the sublease the *Authority* did fix the rates, which it as lessor agrees not to reduce." (The Supreme Court's italics.)

In the instant case, in Section 13 of the Lease, the Authority fixes the rates.

The Plaintiff also contends that the Trial Court erred in certain of its rulings on evidence and in certain of its rulings relating to discovery. The Court finds that these rulings were not in error and that the Plaintiff was not substantially prejudiced. The Court, therefore, enters the following

ORDER.

And Now, to Wit, this 23rd day of January, 1963, Plaintiff's exceptions are dismissed, and the Court enters the decree nisi as the final decree.

By THE COURT:

/s/ Reimel, J.

Appendix "B"

IN THE SUPREME COURT OF PENNSYLVANIA,
EASTERN DISTRICT.

No. 175. January Term, 1963.

FRANCES H. SELIGSOHN,
Appellant,

v.

PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY AND STRAWBRIDGE & CLOTHIER.

Appeal From Decree of the Court of Common Pleas No. 5 of Philadelphia County, No. 1626 March Term, 1962, in Equity.

Entered January 23, 1963.

OPINION.

Filed: October 11, 1963.

PER CURIAM:

This appeal is from a decree of the Court of Common Pleas of Philadelphia County which upheld the action of the Philadelphia Parking Authority [Authority] in condemning certain property and in entering into a long term lease with two department stores for the rental of a public parking facility to be erected by the Authority upon the condemned property.

Frances H. Seligsohn, owner of an improved property located at 8th and Filbert Streets, Philadelphia, leased her

building thereon to the Export-Import Clothing Co., a corporation engaged in the sale of men's, women's and children's wearing apparel of which corporation Mrs. Seligsohn was the president and sole stockholder. The Seligsohn building is located across the intersection from Lit Brothers' Department store, operated by City Store Company [Lit], and Strawbridge & Clothier's department store [Strawbridge].

On February 23, 1962, the Authority, created under the Parking Authority Law of June 5, 1947, P. L. 458, as amended, 53 PS § 341 et seq., condemned certain properties, including the Seligsohn property, in the vicinity of and to the north of 8th and Filbert Streets in Philadelphia. On this property the Authority proposes to erect a 950 car public parking facility which will have six entrances for public access as well as access by physical connection with the Lit and Strawbridge stores.

Over a long period of time prior to this condemnation, certain studies and surveys had been made by reputable agencies to determine the need for public parking facilities in the central business district of Philadelphia, including, generally, the area in and about 8th and Filbert Streets. The Authority had the benefit of such studies and surveys.

As the court below found upon adequate evidence "a public parking authority, by its nature, is required to establish facilities which will sustain revenue bonds so that it will be financially independent of the Government with which it is related" and "[r]evenue bonds of a public parking authority, without additional security, are not readily saleable."

Cognizant of the need for a public parking facility in this general area and of the difficulties inherent in the financing of such a project, negotiations were entered into, long prior to condemnation, between the Authority, Lit and Strawbridge. Through such negotiations, a plan was evolved which would assure the erection of a needed public parking facility and its proper and adequate financing.

Under this plan, the Authority would condemn the required property and erect thereon a public parking facility to meet the public needs. This facility would be then leased to Lit and Strawbridge until January 1, 2000, with the right to extension of the lease for a full 50 year term, at rentals to be paid consisting of three parts: (a) debt service rentals sufficient to repay principal and interest on the bonds to be issued by the Authority; (b) Authority rentals of $25,000 per year; (c) excess rentals calculated at 7% of gross revenues of the project over $675,000 and 10% over $775,000. Under this lease, the parking rates were fixed according to a schedule and the Authority agreed not to reduce such rates, except at the request of Lit and Strawbridge. Title to the project would remain in the Authority and, ultimately, vest in the City of Philadelphia, creator of the Authority.

On the basis of this plan, the Authority sold $4,500,000 worth of bonds to finance the project, the security for such bonds being the lease with Lit and Strawbridge without which, as the court below found, the bonds of the Authority would not have been saleable.

The Authority has sold its bonds, condemned the properties, demolished the buildings on the property and the project is now underway.

Mrs. Seligsohn instituted an action in equity in the Court of Common Pleas of Philadelphia County against the Authority, Lit and Strawbridge seeking to enjoin the Authority's condemnation of the property and any performance by the parties under the lease. The court below refused such relief and from its decree Mrs. Seligsohn has appealed.

The attack upon the decree is based on various grounds: (1) that the Authority, under the Parking Authority Law, supra, was without power or authority to condemn this land in the absence of proof that the parking facility would relieve traffic congestion; (2) that the condemnation was not a taking for a *public use*; (3) that the

Authority violates the Parking Authority Law inasmuch as it contemplates the leasing of commercial space in the facility on a noncompetitive basis, gives up the right to fix and alter parking rates and permits the sale by the lessees of automotive accessories on premises which are part of the lessee's shopping complex; (4) that the court below erred in not permitting counsel for Mrs. Seligsohn to inquire into the relationship between Lit and its parent or affiliated companies; (5) that the Authority members acted capriciously and abused their discretion.

We have carefully examined the instant record and the contentions urged by Mrs. Seligsohn. Our conclusion from a study of the instant factual situation and the law applicable thereto is that the court below acted with propriety in entering this decree.

Decree affirmed. Each party to pay own costs.

ROBERTS, *J.* filed a dissenting opinion in which BELL, *C. J.* and EAGEN, *J.* join.

DISSENTING OPINION.

ROBERTS, *J.* Filed: October 11, 1963.

In my view, the record before us is inadequate, inconclusive and insufficient to support the conclusion of the majority.

The negotiated lease arrangement for the operation of the proposed public parking facility and the attending circumstances disclosed by the record suggest so many elements of private enterprise and advantage that the benefits pro bono publico seem rather incidental and questionable. "Nothing, of course, is better settled than that property cannot be taken by government without the owner's consent for the mere purpose of devoting it to the private use of another, even though there be involved in the transaction an incidental benefit to the public". *Pelczsh v. Redevelopment Authority*, 357 Pa. 329, 340, 54 A. 2d 277, 282 (1947).

Section 5(b)(1) of the Parking Authority Law, Act of June 5, 1947, P. L. 458, as amended, 53 P. S. § 345 (1957), limits the existence of the Authority to a "term of fifty years as a corporation." The record indicates that the present Authority came into existence in 1950, and, therefore, at the execution of the lease had thirty-seven years of remaining life. The lease for the term expiring in January, 2000, is within the statutory corporate existence of the Authority. However, the right granted lessees to extend the lease for a full fifty year term carries the relationship far beyond the life granted the Authority by the Act itself.

Section 5(b)(9) mandates that Authority bonds may "have a maturity date not longer than forty years from the date of issue, except that no refunding bonds shall have a maturity date longer than the life of the Authority." The terms of the lease and the right of lessees to an extension (to a full 50 year term) provide for rentals to include

"debt service rentals sufficient to repay principal and interest on the bonds to be issued by the Authority." Bonds to mature not later than January, 2000, satisfy this requirement of the Act. However, the provision in the lease extension for "debt service rentals sufficient to repay principal and interest on the bonds" apparently contemplates that bonds, perhaps refunding bonds, will extend beyond forty years and the life of the Authority. If this be so—and there is nothing in the record submitted to support a contrary conclusion—such extended financing is without support in the enabling Act. If, on the other hand, all bonds are to mature not later than the expiration date of the original lease, why then the debt service provision as an element of rental during the extension of the lease? And if there need be no provision for debt service in the extension, does this mean that the total rental has been reduced by the absence of debt service payments?

For these reasons, I would vacate the decree and remand the record for the purpose of receiving additional evidence to determine compliance with the Parking Authority Law and to resolve doubts as to the predominance of private interests over those of the public.

MR. CHIEF JUSTICE BELL AND MR. JUSTICE EAGEN JOIN IN THIS OPINION.

APPENDIX "C".

COURT OF COMMON PLEAS NO. 5

MARCH TERM, 1962.

No. 1626 IN EQUITY

FRANCES H. SELIGSOHN AND EXPORT-IMPORT CLOTHING CO.

v.

THE PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY AND STRAWBRIDGE & CLOTHIER.

COMPLAINT IN EQUITY.

Plaintiffs bring this action for their benefit and for the benefit of all taxpayers similarly situated:

1. The plaintiffs are:

(a) Frances H. Seligsohn, a resident of the City of Philadelphia, 2434 N. 59th Street, and the owner of a lot and building at the northeast corner of Eighth and Filbert Streets (35-37 N. Eighth Street), in the City of Philadelphia.

(b) Export-Import Clothing Co., a Pennsylvania corporation engaged in the sale of men's, women's and children's wearing apparel at the northeast corner of Eighth and Filbert Streets (35-37 N. Eighth Street) in the City of

Philadelphia. It is a corporation wholly owned by members of the Seligsohn family.

(c) Members of the Seligsohn family have been engaged in the retail sale of economy priced men's, women's and children's wearing apparel in the vicinity of Eighth and Filbert Streets for over half a century. They are one of the largest sellers of economy priced clothing in the City of Philadelphia, and it is believed that they may be exceeded in such sales only by the defendant department stores and other of the large department stores.

(d) The property at the northeast corner of Eighth and Filbert Streets was purchased by Samuel C. Seligsohn (now deceased) and Frances H. Seligsohn, his wife, for the continuation and operation of the said business developed by them.

(e) Export-Import Clothing Co. has been the operator of the said business at Eighth and Filbert Streets since 1952. In the past decade alone, it has expended more than One-half Million Dollars in advertising the said location and the business operated thereat.

2. The defendants are:

(a) The Philadelphia Parking Authority, a corporation created pursuant to and purporting to act under The Parking Authority Law of the Commonwealth of Pennsylvania (Act of June 5, 1947, P. L. 458, as amended) and an Ordinance of Council of the City of Philadelphia approved January 11, 1950.

(b) City Stores Company, a Delaware corporation, with offices in New York City, New York, and with a principal place of business in the City of Philadelphia at c/o Lit Bros., Eighth and Market Streets, Philadelphia, Pennsylvania. It is the principal owner and operator of Lit Bros. Department Store at Eighth and Market Streets in the City of Philadelphia.

(c) Strawbridge & Clothier, a Pennsylvania corporation, with its principal place of business at 801 Market Street, Philadelphia, Pennsylvania.

3. The plaintiffs and the department store defendants are, and have for many years been, direct competitors in the sale of economy priced men's, women's, and children's wearing apparel. They sell many of the same brand names, advertise products in the same or similar advertising media in the same general price range, and for many years been engaged in direct and vigorous competition in the vicinity of Eighth and Filbert Streets.

4. On or about July 26, 1960, The Parking Authority entered into a private agreement with the department store defendants by the terms of which it agreed to purchase or, "upon the written consent" of City Stores and Strawbridge & Clothier, to condemn certain property in the vicinity of Eighth and Filbert Streets, and to lease the property so condemned or purchased back to the department store defendants for a period of fifty years to operate as a parking garage and to provide room for the expansion of the retail selling areas of the department store defendants. The plaintiffs and the public generally were given no notice of this agreement.

At the center of the property to be acquired by The Parking Authority under the said agreement was the property owned by the plaintiffs and operated by them at the northeast corner of Eighth and Filbert Streets.

5. On February 23, 1962, apparently after procuring the "written consent" and approval of the department store defendants, The Parking Authority adopted a Resolution condemning properties in the vicinity of and to the north of Eighth and Filbert Streets for the so-called "Eighth and Filbert Streets Project"—among them the plaintiffs' property—and on March 6, 1962, The Parking

Authority filed a Petition and Rule at C. P. 3, December Term, 1961, No. 4618, for Leave to File Bond.

6. There was no public hearing of any kind, nor was there notice to the condemnees prior to the condemnation action of The Parking Authority. Although the aforesaid Petition and Rule were filed on March 6, 1962, they were not forwarded to the plaintiffs until almost two weeks later.

7. Notwithstanding the express provisions of the applicable law requiring the tender of a bond by The Parking Authority to the plaintiffs prior to the presentation of any Petition for Leave to File Bond to the Common Pleas Court, at no time was a bond tendered by The Parking Authority to the plaintiffs.

8. The said Petition for Leave to File Bond was further faulty:

(a) In that although the law requires entities without authority to offer the power of taxation as sufficient security for said bonds to tender bond with sureties to the Court, The Parking Authority failed to offer such sureties; and,

(b) The Board of Directors of The Parking Authority did not even approve the filing of its own bond unconditionally, but rather conditioned it upon the receipt of future proceeds from certain revenue bonds.

9. On February 28, 1962, a lease, backdated as of January 1, 1962, was entered into between The Parking Authority and the defendant department stores. Said lease and the appendices and plans approved in connection therewith provided, inter alia:

(a) That The Parking Authority would purchase or condemn, subject to the approval of City Stores Company and Strawbridge & Clothier, a large series of parcels of

property in the vicinity of Eighth and Filbert Streets, construct a parking garage with twenty-four thousand (24,000) square feet of "retail space" thereon, and lease the entire garage and retail space back to City Stores Company and Strawbridge & Clothier for a term of up to fifty (50) years at a nominal average rental of Twenty-five Thousand Dollars ($25,000) per year (for a garage to cost in the neighborhood of Four and One-half Million Dollars ($4,500,000)) plus the cost of debt service and retirement of certain bonds to be issued by The Parking Authority to finance such construction, plus seven (7%) per cent of gross revenues exceeding Six Hundred Seventy-five Thousand ($675,000) Dollars yer year, or ten (10%) per cent of gross revenues exceeding Seven Hundred Seventy-five Thousand ($775,000) Dollars per year.

(b) That the parking garage shall be physically connected with the department stores owned by the defendants and shall provide direct access from several of the parking decks of the garage to corresponding upper floors of the department stores owned by the defendants.

(c) That the defendant department stores may erect signs in and upon the parking garage inviting patronage to the defendants' department stores and directing prospective patrons thereto.

(d) That the lessees are to have approximately twenty-four thousand (24,000) square feet of "retail area" made available to them on the ground floor of the so-called parking garage and to have the right to develop basement space beneath the parking garage for use in connection with the stores and the basement stores operated by the said defendant department stores.

(e) That the defendant department stores have the right to make alterations "or install such fixtures and equipment in parking project as may reasonably be required for the conduct of business in City Stores Space.

City Stores Basement Space, Strawbridge & Clothier Space and/or Strawbridge & Clothier Basement Space."

10. The defendant department stores presently own, lease or operate large parking lots and other property on the north side of Filbert Street between Seventh and Ninth Streets, having assessed tax valuations of approximately One-half Million Dollars. Considerable portions of such property will, under the scheme hereinabove set forth, be "sold" to The Parking Authority, full payment made to the defendant department stores therefor, and that said property would then be leased back to the sellers *tax free* for similar parking purposes.

11. In addition to the property referred to in the preceding paragraph, plaintiffs are informed and believe it to be true, that if the parking project herein be allowed, taxable property considerably in excess of One Million Dollars will be lost to the taxpayers of Philadelphia.

12. Notwithstanding the express provisions of Section 5 of The Parking Authority Law prohibiting the sale of automotive accessories in connection with parking garages erected pursuant to The Parking Authority Law, the defendant department stores have and will maintain departments selling automotive accessories, supplies and tires.

13. Notwithstanding the express provisions of Section 5 of The Parking Authority Law prohibiting the sale of any commodity of trade or commerce in connection with parking garages erected pursuant to The Parking Authority Law, the lease between the defendants allocates to the department store defendants approximately twenty-four thousand (24,000) square feet of space designated "retail area" for such use.

14. The condemnation, lease and other sections hereinabove referred to are the product of bad faith and

capricious action, and are a manifest and flagrant abuse of the discretion and power of The Philadelphia Parking Authority.

15. The condemnation proposed presents an unlawful taking not for public purposes in violation of plaintiffs' Constitutional rights.

16. Unless the proposed actions of The Parking Authority and the agreements and leases among the defendants are enjoined, the plaintiffs and other taxpayers similarly situated, will be irreparably harmed.

WHEREFORE, the plaintiffs pray that:

(1) The defendant Parking Authority be permanently enjoined from condemning plaintiffs' property or any other property in connection with the so-called Eighth and Filbert Streets Project.

(2) The defendants be enjoined from performing in any way the agreements dated June 26, 1960 or the lease dated as of January 1, 1962.

(3) The plaintiffs be awarded costs and counsel fee in connection with this action.

(4) The plaintiffs have such other relief as the Court shall deem proper.

COHEN, SHAPIRO AND COHEN,
By: /s/ REUBEN E. COHEN,
Attorneys for Petitioners.

COURT OF COMMON PLEAS NO. 5

MARCH TERM, 1962. NO. 1626.

IN EQUITY.

FRANCES H. SELIGSOHN AND EXPORT-IMPORT CLOTHING CO.

v.

THE PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY AND STRAWBRIDGE & CLOTHIER.

PLAINTIFFS' REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

AND NOW, this 12th day of July, 1962, the plaintiffs, Frances H. Seligsohn and Export-Import Clothing Company, come and pray your Honorable Chancellor to make the following:

FINDINGS OF FACT.

The Parties.

1. Frances H. Seligsohn is the owner of a lot and building at the northeast corner of 8th and Filbert Streets, 35-37 N. 8th Street, Philadelphia, Pennsylvania (Complaint and Answers, par. 1(a); N. T. pgs. 116-118).

2. Export-Import Clothing Company is a Pennsylvania corporation wholly owned by members of the Seligsohn family (Complaint and Answers par. 1(b); N. T. pg. 132).

3. Export-Import Clothing Company is engaged in the sale of men's, women's and children's wearing apparel at the northeast corner of 8th and Filbert Streets, 35-37 N. Eighth Street, Philadelphia, Pennsylvania (Complaint and Answers par. 1(b); N. T. pgs. 116-118).

4. The management of Export-Import Clothing Company is shared by the two sons of Frances H. Seligsohn (N. T. pg. 117), and prior to the death of their father, some two years ago, he had been engaged in the sale of retail wearing apparel in the vicinity of 8th & Filbert Streets for approximately 50 years (N. T. Pages 117-118).

5. The premises at the northeast corner of 8th & Filbert Streets, 35-37 N. 8th Street, Philadelphia, Pennsylvania, were purchased by members of the Seligsohn Family in 1939 for use by their wearing apparel business, and the premises are presently leased by Frances H. Seligsohn to the Export-Import Clothing Company (N. T. Pages 116-118).

6. The Philadelphia Parking Authority is a corporation created pursuant to and purporting to act under The Parking Authority Law of the Commonwealth of Pennsylvania (Act of June 5, 1947, P. L. 458, as amended) and Ordinance of Council of the City of Philadelphia approved January 11, 1950 (Complaint and Answer para. 2(a); N. T. Page 43).

7. City Stores Company is a Delaware Corporation with offices in New York City, New York, and a principal place of business in the City of Philadelphia at c/o Lit Bros., 8th & Market Streets, Philadelphia, Pennsylvania. It is the owner and operator of the Lit Bros. Department Store at 8th & Market Streets in the City of Philadelphia (Complaint and Answer para. 1(b); N. T. Pages 43-44).

8. Strawbridge & Clothier is a Pennsylvania Corporation operating a Department Store with its principal place of business at 801 Market Street, Philadelphia, Pennsylvania (Complaint and Answer para. 2(c); N. T. Page 44).

9. The "8th & Filbert Streets Project" is a proposed five (5) story self-parking garage which, if constructed, would stand between Filbert and Arch Streets in the City of Philadelphia and would bridge Eighth Street along the entire length of that block. It would extend approximately one-third of the way west of Eighth Street in the block between Eighth and Ninth Streets and one-third of the way east of Eighth in the block between Seventh and Eighth Streets. The south wall of that portion of the garage east of Eighth Street would bridge Filbert Street and would adjoin the Lit Bros. Department Store. Direct access from the upper floor of the garage to the upper floors of Lit Bros. would be provided. A bridge would connect that portion of the garage west of Eighth Street with the Strawbridge & Clothier Department Store, providing direct access from the upper floors of the garage to that store. Twenty-four thousand (24,000) square feet of "retail area" would be provided on the ground floor of the garage along both sides of Eighth Street (Pages 27-35 of Exhibit P-4; Page 27 of Exhibit P-24).

The Condemnation, Agreements and Lease.

10. On or about March 20, 1962, the plaintiffs were served with notice that their property at 35-37 North Eighth Street had been condemned by the Philadelphia Parking Authority, the said notice being in the form of a Petition for Leave to File Bond at C. P. No. 3, December Term, 1961, No. 4618.

11. Prior to November 21, 1957, Lit Bros. approached the Philadelphia Parking Authority and informed them of their desire to have a garage built in the block bounded by Arch Street, Seventh Street, Filbert Street and Eighth Street (N. T. Page 424).

12. The proposed transaction as outlined by Lit Bros., including "conditions" imposed by Lit Bros. for their

Agreement to convey land to the Authority, was as follows (Exhibit P-12, N. T. Pages 508-513):

(a) Lit Bros. was to convey all the property which it owned in the block bounded by Seventh Street, Eighth Street, Filbert Street and Arch Street and the Parking Authority was to acquire by purchase or condemnation all of the remaining property in that block (N. T. Page 509).

(b) The buildings in that block were to be demolished and a multi-story parking garage to be constructed which would accommodate approximately 1000 cars on a diagonal self-parking pattern (N. T. Page 509).

(c) The cost of acquisition, construction and other related costs were to be financed by the sale of Parking Authority Revenue Bonds (N. T. Page 509).

(d) The completed parking garage was to be leased to Lit Bros. for a term of forty (40) years at a rental sufficient to repay the principal and interest on the Bonds, the overhead expenses of the Parking Authority in connection with the project, and a reasonable share of the profits (N. T. Pages 509-510).

(e) The proposed Lease between Lit Bros. and the Parking Authority was to be patterned after the Lease between the Pittsburgh Parking Authority and Joseph Horne Company (N. T. Page 510).

(f) Because the Parking Authority Law requires that rates be set by the Authority, the Lease was to provide an initial scale of rates which were not to be reduced without the approval of the Lessee, Lit Bros. (N. T. Page 510).

(g) The Lease was to contain a provision for the use of basement space as a loading depot for Lit Bros. (N. T. Page 510).

(h) Lit Bros. was to be permitted to retain a bridge over Filbert Street as a means of access between the Lit Bros. Store and the proposed garage (N. T. pg. 510).

(i) The Lease was to provide for the erection of selling space on Eighth Street, with the right on the part of Lit Bros. to sublet such space if it so desired (N. T. pg. 510).

(j) Lit Bros. and the Parking Authority recognized that the Parking Authority Law prohibited use of a portion of the garage premises for the sale of gasoline and auto accessories, and contemplated that "if Lits desired to have space within the above described block devoted to the sale of auto accessories, provision can be made for Lits to retain title to approximately three thousand (3,000) square feet of space in which such activities will be conducted and to convey to the Authority air rights above that space," and even allowed "access between the first floor level of the garage and the area retained by Lits for the sale of auto accessories" (N. T. pg. 511).

13. When the President of Strawbridge & Clothier was informed by the Chairman of the Parking Authority in the summer of 1959 that Lit Bros. and the Philadelphia Parking Authority proposed to construct a garage on the east side of Eighth Street, the President of Strawbridge & Clothier informed the Chairman of the Parking Authority that under those circumstances Strawbridge & Clothier wished to discuss possible participation in the proposed garage with the Parking Authority (N. T. Page 507).

14. The National Garages Parking Study prepared for and under the direction of the Philadelphia Parking Authority reveals the following reason for the selection of the Eighth and Filbert site on the first page of the said study:

"The site was selected with the objective of providing maximum convenience to the patrons of the Strawbridge & Clothier Department Store and the Lit Bros. Department Store. This convenience is further enhanced by the provision of direct access from the upper parking floors across Filbert Street to both the stores. . . . ." (Page 1 of Exhibit P-4)

15. On July 26, 1960, the Philadelphia Parking Authority and the defendant Department Stores entered into an Agreement setting forth the following objectives:

(a) A multi-story modern parking garage is to be constructed to accommodate approximately one thousand (1,000) cars in a diagonal self-parking pattern.

(b) The Parking Authority was to acquire land by purchase or condemnation.

(c) The Parking Garage was to have connections across Filbert Street at various levels between the parking garage building and the department stores operated by Strawbridge & Clothier and Lit Bros., granting direct access from the upper floors of the garage to the two department stores.

(d) The costs of acquisition, construction, and other related expenses were to be financed on a permanent basis by the sale of Parking Authority Revenue Bonds, to be repaid solely out of revenues derived from the Leases on the parking garage building. The parking garage building was to be leased by the Authority to the Defendant Department Stores for a term and at a rental sufficient to repay the principal and interest of the Bonds, the overhead expenses of the Authority in connection with the project, and such other terms and conditions as the parties shall agree (Exh. P-20).

16. On June 26, 1961, the defendants entered into a further Agreement which provided, inter alia:

(a) That the defendant department stores "hereby *authorize*" the Authority to negotiate for real property at prices "no more than the prices approved in writing by the Defendant Department Stores."

(b) Upon obtaining the "written consent" of the Defendant Department Stores, the Authority shall undertake to acquire the balance of the real estate for the parking garage by condemnation.

(c) The Authority would submit to the Defendant Department Stores an estimate of the legal fees for the attorneys for the Philadelphia Parking Authority "which charge shall be subject to the approval of the attorneys for the City Stores and Strawbridge & Clothier". The said fees for the attorneys for Philadelphia Parking Authority, subject to the approval of counsel for the Defendant Department Stores, would be payable out of the Revenue Bonds, but if the project were abandoned, the fees for services rendered to date by the attorney for the Philadelphia Parking Authority would be paid by City Stores and Strawbridge & Clothier (Page 3, Sub-para. 5 of Exhibit P-22).

(d) If the Defendant Department Stores were to withdraw from the Agreement, the Parking Authority agreed to promptly convey all the property acquired by negotiation or condemnation on the east side of Eighth Street to Lit Bros. and to convey all the property acquired by negotiation or condemnation on the west side of Eighth Street to Strawbridge & Clothier.

17. Exhibit "A" to the Agreement dated June 26, 1961, between the Defendant Department Stores and the Philadelphia Parking Authority set forth the general terms of a lease to be executed in the future.

18. On February 23, 1962 at a meeting of the Philadelphia Parking Authority attended by Max H. Raab, William D. Teefy and Ralph E. Withington, and no other members of the Parking Authority, upon motion by Mr. Withington and seconded by Mr. Teefy, the Philadelphia Parking Authority appropriated and condemned:

"All those certain lots or tracts of ground together with all buildings and improvements erected thereon lying within the following boundaries:

(a) Beginning at the intersection of the south side of Arch Street (72′ wide) and west side of Eighth Street (50′ wide), thence extending westward along the south side of Arch Street the distance of ninety nine feet to a point, thence extending southward on a line parallel with Eighth Street the distance of two hundred thirty feet one and one quarter inches to a point, thence extending westward on a line parallel with Filbert Street the distance of eighteen feet to a point, thence extending southward on a line parallel with Eighth Street the distance of seventy three feet ten and three quarter inches to a point in the north side of Filbert Street (51′ wide), thence extending eastward along the north side of Filbert Street the distance of one hundred seventeen feet to the west side of Eighth Street, thence extending northward along the west side of Eighth Street the distance of three hundred four feet to the first mentioned point and place of beginning.

(b) Beginning at the intersection of the south side of Arch Street (66′ wide) and the east side of Eighth Street (50′ wide), thence extending eastward along the south side of Arch Street the distance of one hundred forty six feet six inches to a point, thence extending southward on a line parallel with Eighth Street the distance of one hundred fifty nine feet three

inches to a point, thence extending westward on a line parallel with Arch Street the distance of five feet six inches to a point, thence extending southward on a line parallel with Eighth Street the distance of one hundred twelve feet two and one half inches to a point in the north side of Filbert Street (40' wide), thence extending westward along the north side of Filbert Street the distance of one hundred forty one feet to the east side of Eighth Street, thence extending northward along the east side of Eighth Street the distance of two hundred seventy one feet four inches to the first mentioned point and place of beginning.

Including but not limited to:

Address

726 Arch and 727 Filbert Streets
729 Filbert Street
731-33 Filbert Street
N.E. cor. Eighth & Filbert Streets
39-41 N. Eighth Street
45-47 N. Eighth Street
49-51 N. Eighth Street
52-54 N. Eighth Street
53 N. Eighth Street
55 N. Eighth Street
57 N. Eighth Street
S.E. cor. Eighth & Arch Streets
732 Arch Street
736 Arch Street
734 Arch Street
728-30 Arch Street
809 Filbert Street
807 Filbert Street
32-34 N. Eighth Street
36 N. Eighth Street
38 N. Eighth Street

Address

40 N. Eighth Street
42 N. Eighth Street
44 N. Eighth Street
46-48 N. Eighth Street
50 N. Eighth Street
56 N. Eighth Street
58-60 N. Eighth Street
800 Arch Street
802 Arch Street
804 Arch Street
806-08 Arch Street

19. On February 23, 1962, at a meeting of the Philadelphia Parking Authority attended by Max H. Raab, William D. Teefy and Ralph E. Withington, and no other members of the Parking Authority, upon motion of Mr. Withington and seconded by Mr. Teefy, the Philadelphia Parking Authority authorized the Chairman or Vice-Chairman and Secretary or Assistant Secretary to execute, acknowledge and deliver a Lease dated as of January 1, 1962 from the Parking Authority as Lessor to City Stores Company and Strawbridge & Clothier as Lessees under the terms and conditions set forth (Exhibit P-26).

20. On February 27th and February 28, 1962, the said Lease dated as of January 1, 1962 by and between the Philadelphia Parking Authority, City Stores Company and Strawbridge & Clothier was executed by officials of the three (3) said Defendants (Exhibit P-24, pages 35-36).

21. The Lease provides, inter alia:

(a) That the Philadelphia Parking Authority leases to Strawbridge & Clothier and City Stores Company the proposed Eighth and Filbert Street Parking Garage for a period to terminate on January 1, 2000, unless extended at the option of the Lessees

to a term of fifty (50) years (Pages 2 and 21 of Exhibit P-24).

(b) The proposed garage will contain approximately 315,000 square feet devoted to parking and will provide diagonal parking for approximately 950 cars (Page 27 of Exhibit P-24).

(c) Twenty-four thousand (24,000) square feet of retail area will be provided (Page 27 of Exhibit P-24) including approximately 12,448 square feet on the street level on the east side of Eighth Street between Filbert and Arch Streets, known as "City Stores Space" and 11,452 square feet on the street level on the west side of Eighth Street between Arch and Market Streets, known as "Strawbridge & Clothier Space" (Pages 2 and 3 of Exhibit P-24).

(d) The Defendant Department Stores have the right to construct, alter and improve basement space under the parking site, that portion of the basement space under the project site east of the east side of Eighth Street to be known as "City Stores Basement Space", and that portion of basement space under the project site west of the west side of Eighth Street to be known as "Strawbridge & Clothier Basement Space" (Pages 2 and 3 of Exhibit P-24).

(e) The Defendant Department Stores are granted the right to themselves use or to sublet the so-called City Stores Space, the City Stores Basement Space, the Strawbridge & Clothier Space and or the Strawbridge & Clothier Basement Space (Para. 4(E), Page 3 of Exhibit P-24).

(f) The Parking Authority agrees to acquire by purchase at "no more than the price approved in writing by City Stores and Strawbridge & Clothier", or "upon obtaining the written consent thereto by City

Stores and Strawbridge & Clothier" to acquire by condemnation, the real estate necessary for the proposed Parking Garage (Page 31 of Exhibit P-24).

(g) The Parking Garage will be constructed to provide pedestrian access from the upper floors of the Parking Garage to the upper floors of the Lit Bros. and Strawbridge & Clothier Department Stores (Page 27 of Exhibit P-24; "Exhibit D" appearing at Page 5 of Exhibit P-4; "Exhibit A" appearing at Pages 27-32 of Exhibit P-4).

(h) The Defendant Department Stores are given the right to erect and maintain signs on the parking project to invite patronage to themselves and to the parking garage (Page 3 of Exhibit P-24).

(i) The rental to be paid consists of three (3) parts:

(1) Debt Service Rentals sufficient to repay principal and interest on the Bonds (Page 4 of Exhibit P-24).

(2) Authority Rentals at an average of Twenty-five Thousand Dollars ($25,000) for each lease year (Page 7 of Exhibit P-24), and

(3) Excess Rentals at the rate of 7% of the gross revenue of the parking project per year over Six Hundred Seventy-five Thousand Dollars ($675,000) and 10% thereof over Seven Hundred Seventy-five Thousand Dollars ($775,000) (Page 8 of Exhibit P-24).

(j) The rates to be charged for parking during the term of the Lease are fixed and agreed to as per a Schedule set forth in the Lease, and the Parking Authority agrees not to reduce the rates except at the request of the Lessees (Pages 10 and 11 of Exhibit P-24).

(k). The Lease provides that if the Lessees be required to pay taxes assessed upon their leasehold interest in the parking project, such taxes will be offset against the Authority Rentals (Page 8 of Exhibit P-24).

(l) Alterations, improvements, fixtures and equipment made or installed by the Defendant Department Stores or their sub-tenants or licensees are to remain the property of the Defendant Department Stores and may be removed by them at any time prior to expiration of the Lease (Para. 16(a) on Page 12 of Exhibit P-24).

(m) The Parking Authority agrees not to compromise any claim for compensation on account of condemnation without the prior written consent of the Defendant Department Stores (Page 34 of Exhibit P-24).

22. With the exception that the proposed garage is to be located on both sides of Eighth Street, rather than solely on the east side of Eighth Street, no term or condition contained in the Lease dated as of January 1, 1962 varies in any significant fashion from the proposals and conditions set forth by Lit Bros. as reflected in Exhibit P-12 (N. T. pgs. 508 et seq.; Finding of Fact 12 above).

23. The proposed parking garage at Eighth and Filbert Streets is the first time in the history of Philadelphia that the Philadelphia Parking Authority has made a leasing arrangement with Department Stores or similar retail stores (N. T. pg. 203).

24. Counsel for Lit Bros., Samuel Goodis, Esq., procured P-9 containing the Lease between the Pittsburgh Parking Authority and the Horne Company from the Pittsburgh Parking Authority on behalf of Lit Bros. (N. T. pg. 100).

25. The Lease between the Pittsburgh Parking Authority and the Horne Company (Exhibit P-9) was used to a large degree as a form for the Lease entered into among the Defendants (N. T. pg. 219).

26. All of the modifications made in provisions of the Horne Company Lease incorporated into the Lease among the Defendants, make those provisions more favorable for the Defendant Department Stores than are the similar provisions with regard to the Lessees in the Horne Company Lease.

27. Under the Horne Company Lease 7% of all gross income over Four Hundred Fifty Thousand Dollars ($450,000) are payable by the Horne Company to the Pittsburgh Parking Authority and that amount was raised to 10% for all income over Five Hundred Fifty Thousand Dollars ($550,000) (Para. 15, Page 28 of Exhibit P-9).

28. The estimated gross income from the fifth and succeeding years at the Horne Company Garage in Pittsburgh is Four Hundred Twenty Thousand Six Hundred Dollars ($420,600) (Page 6 of Exhibit P-9).

29. Excess rental in the Defendants' Lease begins at the rate of 7% for gross revenues over Six Hundred Seventy-five Thousand Dollars ($675,000) and 10% over Seven Hundred Seventy-five Thousand Dollars ($775,000) (Para. 9, Page 8 of Exhibit P-24).

30. The projected income for the fifth year and thereafter at the 8th & Filbert Garage is Three Hundred Eighty-three Thousand Nine Hundred Dollars ($383,900) as projected by the Wilber Smith Economic Analysis (Page 20 of Exhibit P-3) or Three Hundred Seventy Thousand Seven Hundred Dollars ($370,700) as projected by the National Garage Co., Inc. Feasibility Study (Page 21 of Exhibit P-4).

31. The provision for excess rentals is largely meaningless in the Defendants' Lease, but under the Horne Company Lease, the Lessee will very likely be required to pay excess rentals to the Pittsburgh Parking Authority.

32. Section 11 of the Horne Company Lease (Page 26 of Exhibit P-9) limits the use of the premises to the provisions of the Parking Authority Law, while para. 4(a) of the Defendants' Lease (Page 3 of Exhibit P-24) permits both use in accordance with the provisions of the Parking Authority Law and those uses set forth in "this Lease".

33. Section 11 of the Horne Company Lease (Page 26 of Exhibit P-9 limits the sub-letting of stores to such commercial use as is permissible "Under the Parking Authority Law on such fair competitive basis as is required by such Law", while Section 4(b) of the Defendants' Lease (Page 3 Exhibit P-24) does not set forth the "fair competitive basis" requirement, and permits the Lessees themselves to use the store space and the basement space.

34. Section 12 of the Horne Company Lease (Page 26 of Exhibit P-9) permits the maintenance of signs upon the premises only to invite patronage for the project or to give traffic directions, while Section 5 of the Defendants' Lease (Page 3 of Exhibit P-24) permits the erection and maintenance of signs to invite patronage for the Lessees themselves.

35. Section 26 of the Horne Company Lease (Page 32, Exhibit P-9) provides that all alterations, improvements, fixtures and equipment made on the premises shall become the property of the Authority and constitute an integral part of the garage, while para. 16 of the Defendants' Lease (Page 12, Exhibit P-24) provides that all alterations, improvements, fixtures and equipment shall remain the property of the Lessees and may be removed by them at any time prior to expiration of the Lease.

36. Under the Horne Company Lease (II, Page 35, Exhibit P-9) the Pittsburgh Parking Authority reserved the right to change plans and specifications, while under the Defendants' Lease (II, Page 27, Exhibit P-24) all such changes are subject to the approval of the Lessee.

37. The garage constructed pursuant to the Lease between Pittsburgh Parking Authority and the Horne Company is not a garage physically connected with the Horne Company Store (N. T. Page 478).

Traffic Congestion.

38. The Wilbur Smith Economic Analysis reveals that: "Construction of the proposed parking garage will attract increased volumes of vehicles to the area and thereby introduce additional loadings on surrounding streets" (Page 13 of Exhibit P-3).

39. The Wilbur Smith Economic Analysis anticipates that during peak afternoon hours the proposed parking garage will cause an increase in traffic on Arch Street by 270 vehicles, on Filbert Street and on Ninth Street by 50 vehicles, and traffic on Seventh Street and Eighth Street by 60 vehicles (Page 13 of Exhibit P-3).

40. The "possible capacity" of Eighth Street as shown on the Wilbur Smith Economic Analysis is 720 vehicles (Page 12 Exhibit P-3).

41. "Possible capacity" is defined in the Highway Capacity Manual published by the United States Bureau of Public Roads, Washington, D. C., as "the maximum number of vehicles that can pass a given point on a lane or roadway during one hour under the prevailing roadway and traffic conditions. It is the volume of traffic that cannot be ex-

ceeded in actuality without changing one or more of the conditions that prevail" (N. T. Page 256; Page 6 of the U. S. Bureau of Public Roads, Highway Capacity Manual).

42. In determining the impact of a given facility on existing streets, the limitation used and applied by planners and traffic engineers is "practical capacity" (N. T. Pages 257-258).

43. "Practical Capacity" is defined in the Highway Capacity Manual published by the United States Bureau of Public Roads as "the maximum volume that can enter the intersection from that approach during one hour with most of the drivers being able to clear the intersection without waiting for more than one complete single cycle. Practical capacities have been found to be approximately 80% of possible capacity" (N. T. Page 258; Page 72 of the United States Bureau of Public Roads' Highway Capacity Manual).

44. The "practical capacity" of Eighth Street during the peak hours is 576 vehicles (N. T. Page 259).

45. The "peak-flow rate" on Eighth Street between 5:00 and 6:00 P. M. as revealed in the Wilbur Smith Economic Analysis is 595 vehicles (Page 12 of Exhibit P-3).

46. The construction of the proposed parking garage at 8th & Filbert Streets will cause an increase in traffic on Eighth Street of 60 vehicles, or a total "peak-flow rate" on Eighth Street of 600 vehicles (N. T. Page 263).

47. The construction of the proposed parking garage at 8th & Filbert Streets would cause the practical capacity of Eighth Street to be greatly exceeded during peak hours.

48. The construction of the proposed parking garage at 8th & Filbert Streets would cause a considerable increase in traffic congestion on Eighth Street.

49. The Wilbur Smith Economic Analysis reveals that the "possible capacity" of Ninth Street is 900 automobiles, and it may be calculated therefrom that the "pracical capacity" of Ninth Street is 720 vehicles (Page 12, Exhibit P-3).

50. The Wilbur Smith Economic Analysis reveals that the peak flow rate on Ninth Street is 770 vehicles (Page 12, Exhibit P-3) and that this will be increased by the construction of the proposed parking garage by 50 vehicles (Page 14 of Exhibit P-3).

51. If the proposed parking garage at 8th and Filbert Streets is constructed, Ninth Street, a street with a practical capacity of 720 cars, will have a peak-flow rate of approximately 820 cars during peak hours.

52. The construction of the proposed parking garage at Eighth and Filbert Streets will significantly add to the traffic congestion in the vicinity of Ninth and Filbert Streets.

53. The Wilbur Smith Economic Analysis shows that the "possible capacity" of Arch Street is 1,260 vehicles (Page 12 of Exhibit P-3) from which it may be calculated that the "practical capacity" of Arch Street is 1,008 vehicles during peak hours.

54. The peak-flow rate on Arch Street as revealed by the Wilbur Smith Economic Analysis was 785 vehicles (Page 12 of Exhibit P-3), which, if the proposed parking garage is constructed, would be increased by 270 vehicles (Page 14 of Exhibit P-21) making the peak-flow rate on Arch Street in excess of 1,055 vehicles.

55. The construction of the proposed parking garage at Eighth and Filbert Streets would cause an increase in

the peak-flow rate on Arch Street beyond the practical capacity of that street.

56. The construction of the proposed parking garage at Eighth and Filbert Streets would significantly add to the traffic congestion on Arch Street.

57. The Wilbur Smith Economic Analysis used the hours between 5:00 and 6:00 P. M. as the peak hours in the vicinity of Eighth and Filbert Streets (Page 11 of Exhibit P-3).

58. The records of the Department of Streets of the City of Philadelphia reveal that in a count taken on August 7, 1959, on Eighth Street near Filbert, the peak hour volume was 541 vehicles between the hours of 5:00 and 6:00 P. M. (N. T. pg. 263), and this corresponds almost precisely to the peak hour volume of 540 vehicles on Eighth Street shown by the Wilbur Smith Economic Analysis (Page 12 of Exhibit P-3).

59. The records of the Department of Streets of the City of Philadelphia show that at the same count on August 7, 1959, the volume of 541 vehicles per hour between 5:00 and 6:00 P. M. was exceeded by a volume of 595 vehicles between the hours of 4:00 and 5:00 o'clock P. M. on that same day (N. T. pg. 263).

60. Traffic congestion in the vicinity of Eighth and Filbert Streets is greater between the hours of 4:00 and 5:00 P. M. corresponding to the major outflow of shoppers from the Central Business District, than between the hours of 5:00 and 6:00 P. M. (N. T. pg. 264).

61. The peak hour volumes shown in the Wilbur Smith Economic Analysis would be greater if the Analysis had

used the hour between 4:00 and 5:00 P. M. for its study (N. T. pg. 264).

62. Construction of the proposed parking garage at Eighth and Filbert Streets would not eliminate any curb or on-street parking facilities during peak hours because parking is not permitted during these periods (N. T. pgs. 271, 272).

63. The proposed parking garage at 8th & Filbert Streets would not significantly reduce curb or on-street parking in the area in any way (N. T. Page 271).

64. The construction of the proposed parking facility at 8th & Filbert Streets would increase congestion on the streets in the vicinity of the garage, would interfere with the movement of police and fire emergency equipment, and would interfere generally with the movement of transit vehicles on streets in an area already suffering with considerable traffic congestion (N. T. Page 271).

Availability and Demand for Parking.

65. During the year 1957, the Philadelphia City Planning Commission engaged the firm of Wilbur Smith & Assoc. to prepare a parking study of the Central Business District of the City of Philadelphia (Exhibit P-1 and P-2).

66. Volume 1 of the said Central Business District Parking Study reported on the 1958 parking demand and needs in the Central Business District (Exhibit P-1).

67. Volume 2 of the Central Business District Parking Study reported on the projected 1970 parking demands and needs in the Central Business District.

68. Persons whose object in coming into the Center City Area is shopping walk from 800 to 1,000 feet, or a 3 to

5 minute walking distance, from the place where they park to their shopping destination (N. T. Page 237; Exhibit P-1, Page 33).

69. Lit Bros. Department Store is located between Seventh and Eighth Streets, Market to Filbert Streets, and Strawbridge & Clothier Department Store is located between Eighth and Ninth Streets, Market to Filbert Streets.

70. In addition to studies conducted block by block, the Central Business District Parking Study made certain of its analysis by groupings of block called "sectors". (N. T. Page 241; Exhibit P-1, Pages 5 and 6).

71. The sectors designated in the Central Business District Parking Study which encompass the area bounded by approximately 800 feet to 1,000 feet from Eighth and Filbert or Eighth and Arch Streets are sectors 15, 17, 39 and 37 (N. T. Page 242; Exhibit P-1, Page 6).

72. Sectors 15, 17, 37 and 39 of the Central Business District Parking Study delineate the area bounded by Fourth Street on the east, Thirteenth Street on the west, Chestnut Street on the south and Vine Street on the north (N. T. Page 242; Exhibit P-1, Page 6).

73. The 1958 available parking spaces (Exhibit P-1, Table A), 1958 parking demand (Exhibit P-1, Table P) and surplus or deficiency for each block in the area bounded by Fourth Street, Thirteenth Street, Chestnut Street and Vine Street (Sectors 15, 17, 37 and 39) are as follows (Tables A and P of Exhibit P-1):

Description of block	*Block No. in Study*	*'58 Available Parking Spaces*	*'58 Parking Demands*	*'58 Surplus or Deficiency*
Race-Vine 13th-12th	3701	82	87	−5
Race-Vine 12th-11th	3702	308	160	+148
Race-Vine 11th-10th	3703	152	96	+56
Race-Vine 10th-9th	3704	302	64	+238
Race-Vine 9th-8th	3705	151	33	−118
Race-Vine 8th-7th	3901	50	0	+50
Race-Vine 7th-6th	3902	31	0	+31
Race-Vine 6th-5th	3903	0	0	0
Race-Vine 5th-4th	3904	84	61	+23
Cherry-Race 13th-12th	3706	104	136	−32
Cherry-Race 12th-11th	3707	233	67	+166
Cherry-Race 11th-10th	3708	0	189	−189
Cherry-Race 10th-9th	3709	90	146	−56
Cherry-Race 9th-8th	3710	12	60	−48

Description of block	*Block No. in Study*	*'58 Available Parking Spaces*	*'58 Parking Demands*	*'58 Surplus or Deficiency*
Cherry-Race 8th-7th	3905	421	25	+396
Cherry-Race 7th-6th	3906	103	279	−176
Cherry-Race 6th-5th	3907	72	31	+41
Cherry-Race 5th-4th	3908	76	110	−34
Arch-Cherry 13th-12th	3711	90	131	−41
Arch-Cherry 12th-11th	3712	154	80	+74
Arch-Cherry 11th-10th	3713	111	139	−28
Arch-Cherry 10th-9th	3714	96	71	+25
Arch-Cherry 9th-8th	3715	44	96	−52
Arch-Cherry 8th-7th	3909	82	76	+6
Arch-Cherry 7th-6th	3910	229	32	+197
Arch-Cherry 6th-5th	3911	8	45	−37
Arch-Cherry 5th-4th	3912	28	92	−64
Market-Arch 13th-12th	1501	601	130	+471

Description of block	*Block No. in Study*	*'58 Available Parking Spaces*	*'58 Parking Demands*	*'58 Surplus or Deficiency*
Market-Arch 12th-11th	1502	0	96	−96
Market-Arch 11th-10th	1503	165	186	−21
Market-Arch 10th-9th	1701	70	116	−46
Market-Arch 9th-8th	1702	7	264	−257
Market-Arch 8th-7th	1703	158	283	−125
Market-Arch 7th-6th	3913	68	112	−44
Market-Arch 6th-5th	3914	19	21	−2
Market-Arch 5th-4th	3915	170	100	+70
Chestnut-Mkt. 13th-12th	1504	0	288	−288
Chestnut-Mkt. 12th-11th	1505	500	183	+317
Chestnut-Mkt. 11th-10th	1506	500	197	+303
Chestnut-Mkt. 10th-9th	1704	0	189	−189
Chestnut-Mkt. 9th-8th	1705	0	508	−508
Chestnut-Mkt. 8th-7th	1706	513	146	+367

Description of block	*Block No. in Study*	*'58 Available Parking Spaces*	*'58 Parking Demands*	*'58 Surplus or Deficiency*
Chestnut-Mkt. 7th-6th	3916	111	86	+25
Chestnut-Mkt. 6th-5th	3917	36	0	+36
Chestnut-Mkt. 5th-4th	3918	78	286	−108
TOTALS		6,109	5,497	+612

74. In the area bounded by Fourth Street on the east, Thirteenth Street on the west, Chestnut Street on the south and Vine Street on the north (sectors 15, 17, 37 and 39), in the year 1958, there were a total of 6,109 available parking spaces, a total demand for 5,497 parking spaces, and a net surplus of 612 available parking spaces.

75. The economic analysis of the proposed parking garage at Arch, Eighth and Filbert Streets, Philadelphia, Pennsylvania, made by Wilbur Smith & Associates (Exhibit P-3), selected as the relevant area for considering the relationship of existing parking facilities to the proposed Eighth and Filbert Streets Garage, that area bounded by Eleventh Street on the west, Cherry Street on the north, Fifth Street on the east and Chestnut Street on the south (Exhibit P-3, fig. 1 following page 4; N. T. pg. 392).

76. The 1958 available parking spaces, 1958 demand, and surplus or deficiency of parking spaces as shown by the Center City District Parking Survey for the area bounded by Fifth Street on the east, Cherry Street on the

north, Eleventh Street on the west and Chestnut Street on the south are as follows (Tables A and P of Exhibit P-1):

Description of block	*Block No. in Study*	*'58 Available Parking Spaces*	*'58 Parking Demands*	*'58 Surplus or Deficiency*
Arch-Cherry 11th-10th	3713	111	139	−28
Arch-Cherry 10th-9th	3714	96	71	+25
Arch-Cherry 9th-8th	3715	44	96	−52
Arch-Cherry 8th-7th	3909	83	76	+6
Arch-Cherry 7th-6th	3910	229	32	+197
Arch-Cherry 6th-5th	3911	8	45	−37
Market-Arch 11th-10th	1503	165	186	−21
Market-Arch 10th-9th	1701	70	116	−46
Market-Arch 9th-8th	1702	7	264	−257
Market-Arch 8th-7th	1703	158	283	−125
Market-Arch 7th-6th	3913	68	112	−44
Market-Arch 6th-5th	3914	19	21	−2

Description of block	*Block No. in Study*	*'58 Available Parking Spaces*	*'58 Parking Demands*	*'58 Surplus or Deficiency*
Chestnut-Mkt. 11th-10th	1506	500	197	+303
Chestnut-Mkt. 10th-9th	1704	0	189	−189
Chestnut-Mkt. 9th-8th	1705	0	508	−508
Chestnut-Mkt. 8th-7th	1706	513	146	+367
Chestnut-Mkt. 7th-6th	3916	111	86	+25
Chestnut-Mkt. 6th-5th	3917	36	0	+36
TOTALS		2,217	2,971	−754

77. The total number of available parking spaces in 1958 in the area bounded by Fifth Street on the east, Cherry Street on the north, Eleventh Street on the west and Chestnut Street on the south, was 2,217 and the total parking demand in the said area was 2,971 (Tables A and P to Exhibit P-1).

78. Between 1958 and 1962, the following additional parking spaces have been made available in the area bounded by Fifth Street on the east, Cherry Street on the north, Eleventh Street on the west and Chestnut Street on the south:

Appendix "C"

Description	*Parking Spaces Added Between 1958 & 1962*	*Reference*
8th-9th Chestnut-Market	139	(N. T. Pages 397-398, 407)
7th-8th Market-Chestnut	50	(N. T. Page 406)
6th-7th Chestnut-Market	150	(N. T. Pages 400-407)
5th-6th Market-Arch	450-750	(N. T. Page 407)
6th-7th Market-Arch	67	(N. T. Pages 402, 403, 408)
8th-9th Market-Arch	76	(N. T. Pages 401, 408)
10th-11th Market-Arch	468	(N. T. Pages 401, 408)
	1400-1700	

79. In the area bounded by Fifth Street in the east, Cherry Street on the north, Eleventh Street on the west, and Chestnut Street on the south, between the years 1958 to 1962 there was a net increase of between 1400 and 1700 parking spaces (N. T. Page 408, as corrected above).

80. The increase of available spaces varies because of a variation in the number of spaces allocated to the Independence Mall Parking Lot. The maximum capacity heretofore at that lot was 680 automobiles (N. T. Page 80). The said figure is subject to a decrease of some 150 to 175 spaces as of the time of trial due to construction (N. T. Page 409). When the Independence Mall underground parking garage is completed, it will contain approximately 750 spaces (Exhibit P-5, Page 11; N. T. Pages 80-81).

81. As of 1962, the total number of available parking spaces in the area bounded by Fifth Street on the east, Cherry Street on the north, Eleventh Street on the west and Chestnut Street on the south is at least 3,617 and exceeds the 1958 parking demand by 646 parking spaces.

82. The Central Business District Parking Study estimated that parking demands in the area would increase by 15% between 1958 and 1970 (Page 23 of Exhibit P-2; N. T. pg. 411).

83. The 1970 estimated parking demand as calculated by the measure used in the Central Business District Parking Study for the area bounded by Fifth Street on the east, Cherry Street on the north, Eleventh Street on the west and Chestnut Street on the south is 3,416 parking spaces.

84. In the area bounded by Fifth Street on the east, Cherry Street on the north, Eleventh Street on the west and Chestnut Street on the south, the actual number of spaces available in the year 1962 exceeds the projected 1970 demand by at least 201 spaces (3,617 less 3,416).

85. In the area bounded by Thirteenth Street on the west and Vine Street on the north, Fourth Street on the east and Chestnut Street on the south (Sectors 15, 17, 37 and 39), the 1970 demand as projected by the Central Business District Parking Study, Volume 2, will be 6,503 spaces (Page 33 of Exhibit P-2).

86. In the area bounded by Thirteenth Street on the west and Vine Street on the north, Fourth Street on the east and Chestnut Street on the south (Sectors 15, 17, 37 and 39 as used in the Central Business District Project Study Volume 2), the actual number of available parking spaces in 1962 is 7,109 (Finding of Fact No. 73 above, plus at least 1,400 spaces as per Finding No. 79 above, less 400

space lost by the construction of the new Municipal Police Building at Eighth and Race Streets (N. T. Page 239).

87. In the area bounded by Thirteenth Street on the west and Vine Street on the north, Fourth Street on the east and Chestnut Street on the south (sectors 15, 17, 37 and 39 as used in the Central Business District Project Study, Volume 2), the actual number of parking spaces available in 1962 exceeds the 1970 parking demands as projected by the Central Business District Parking Study by 606 spaces.

88. The 1970 parking demand as projected by the Central Business District Parking Study was based in part upon projected increase in population, including a projected increase for the City of Philadelphia from 2,071,605 persons in 1950 to "about 2,500,000 by 1980" (Page 21 of Exhibit P-2).

89. The actual population of the City of Philadelphia has in fact decreased from 2,071,605 in 1950 to 2,002,512 in 1960 (U. S. Census, 1960).

90. The 1970 Parking demand as projected by the Central Business District Parking Study was based in part on the projection that "transit and rail traffic will remain stable" (Page 23 of Exhibit P-2).

91. Since the submission of the Volume 2 of the Central Business District Parking Study on July 24, 1958, Passenger Service Improvement Corporation had begun operations October 26, 1958 including the well known "Operation Northwest", "Operation Northeast", "Operation Chawmut", etc. (Exhibit P-27). Some 6,200,000 persons yearly have begun to use public transportation as provided by the so called "Operations" since 1958, a 44% gain in the use of those public transportation facilities over pre-operation

years, an increase which has taken place completely since the Central Business District Parking Study was submitted (N. T. Page 414; Exhibit P-27).

92. There is no present public need for new parking facilities in the vicinity of Eighth and Filbert Streets.

93. There will be no public need for new parking facilities in the vicinity of Eighth and Filbert Streets as of 1970.

94. It is not good practice to use adjusted figures in connection with determining the use of off-street parking facilities because such facilities are not filled until all their spaces are occupied, and indeed commercial off-street parking facilities often permit the parking of more vehicles than they actually have parking spaces for, by parking vehicles in the aisles (N. T. Pages 333-334).

95. Mr. Whiteside of Wilbur Smith & Assoc. was present in the courtroom during the trial of this case, was not called to testify or to contradict the testimony of Leslie Williams at any time (N. T. Page 311).

No Comprehensive Study Recommended the Site:

96. Volume 2 of the Central Business District Parking Study, which concerned itself with the 1970 parking demands and needs for the Central Business District, was issued on July 24, 1958 and made the following recommendations: "Along the north side of the core area, three general areas are suggested for development. The first area is between Fifth and Sixth Streets and is the location of the proposed Independence Mall Underground Garage. The next area is located between Ninth and Eleventh Streets. This facility might possibly include the transportation center and a re-development project. Good access to the Vine Street Expressway could be achieved. The third area along

the north side would be between Fifteenth and Sixteenth Streets, which would also connect with the proposed Expressway" (Page 35 of Exhibit P-2).

97. The suggestions contained in Volume 2 of the Central Business District Parking Study were incorporated in the Physical Development Plan for Center City issued by the City Planning Commission on May 17, 1960 (Page 10 of Exhibit P-5).

98. The Physical Development Plan for Center City Philadelphia issued by the City Planning Commission on May 17, 1960 contains the following recommendations with regard to parking facilities. "On the north, connected to the Vine Street Expressway are three parking complexes: under Independence Mall, in the Market East Project, and between Fifteenth and Sixteenth Streets. They will accommodate an additional 6,000 vehicles" (Page 10 of Exhibit P-5).

99. At page 11 of the said Physical Development Plan (Exhibit P-5) is a diagram showing a proposed 750 car parking facility at Independence Mall; a 3,000 car parking facility between Ninth Street and Thirteenth Street, north of Market Street; and two parking facilities between Fifteenth and Sixteenth Streets (Exhibit P-5, Page 10).

100. The Parking Authority parking facility at Independence Mall (eventually to be under Independence Mall) is reflected in the Planning Commission Master Plan for Development of parking facilities in the Central Business District (Exhibit P-5, Page 10).

101. A parking garage has been constructed by the Philadelphia Parking Authority at Eleventh and Market Streets and is shown in Exhibit P-5 to be part of the master

plan for parking in the Center City Area (N. T. Pages 304, 305).

102. Neither the Physical Development Plan (Exhibit P-5) nor the Central Business District Parking Study (Exhibit P-1 and P-2) suggested or recommended a parking facility at or near Eighth and Filbert Streets.

103. No site selection survey made by any competent body has recommended a parking garage in the vicinity of Eighth and Filbert Streets (N. T. Pages 246, 247).

104. The effect of linking the parking garage directly to Department Stores or other generators which draw patrons into the area, is to encourage persons parking in such a garage to walk directly into the generator (N. T. Pages 266, 267).

105. The effect of placing a parking facility a block or two from a generator is to encourage or require parkers to pass other stores or small businesses on their way to and from the generator (N. T. Page 267).

106. The effect of linking a garage directly to a generator or Department Store is to discourage parkers from shopping in small business or other stores, while encouraging them to shop only at the generator stores (N. T. Page 267).

107. Placing a parking garage directly next to the Defendant Department Stores or other generators is bad planning practice because it brings traffic directly into the most congested part of a given area (N. T. Page 285).

108. City Stores is the owner and occupier of a tract of land beginning at the southwest corner of Seventh and Arch Streets, extending west along Arch Street 251 feet and ½ inches, thence south approximately 272 feet in an irregular line to Filbert Street, and thence east to Seventh

Street and north to the beginning point, including 700-29 Arch Street, 40-56 N. Seventh Street and 707-23 Filbert Street (Exhibit P-13; P-6; P-8).

109. The said property owned by City Stores is used by them for parking lot purposes, storage purposes and service purposes (Exhibit P-6; N. T. Page 216).

110. A parking garage of a capacity similar to the proposed Eighth and Filbert Parking Garage could be constructed entirely on real estate owned by City Stores in the block between Seventh Street, Eighth Street, Arch Street and Filbert Street (N. T. Page 275).

111. A parking garage constructed entirely on property owned by Lit Bros. and existing on Seventh Street would interfere with traffic less than the proposed Eighth and Filbert Garage, because Seventh Street does not have street cars on it and is a street which carries a smaller volume of traffic with regard to its capacity (N. T. Page 282-283).

112. Ralph E. Withington did not base his selection of the Eighth and Filbert Street site on any comprehensive report, study or plan for parking in the Center City Philadelphia (N. T. Pages 153-154).

113. A site selection survey differs from a feasibility study in that a site selection survey is concerned with making an appraisal of various areas following a study of available parking spaces and demands with a view to determining potential sites for parking, while a feasibility study is a study made after a particular site has been selected to determine its economic or other feasibility (N. T. Page 251).

114. Neither the Wilbur Smith Economic Analysis nor the National Garages, Inc. Parking Study (Exhibit P-4) are site selection surveys. They are both feasibility studies with regard to a previously selected site.

Tax Loss.

115. The following property owned by the Defendant Strawbridge & Clothier, its subsidiaries, officers or affiliates, will be taken by the proposed parking garage:

Location	*Size*	*1962 Assessed Valuation*
807 Filbert St.	17'6" x 49'	$ 8,100.00
809 Filbert St.	(The exact size of the lot and its assessment are not revealed upon the property assessment records because it is part of the premises 809-25 Filbert Street, which total premises extend along Filbert Street a distance of 186'7" and have a depth of 150'4". The total premises are assessed at $1,602,300.)	
32-48 N. Eighth St.	163'5¼" x 81'	$191,700.00

(P-18, P-13 and P-14).

116. The following property owned by the Defendant City Stores Company, its subsidiaries, officers or affiliates, will be taken by the proposed parking garage:

Location	*Size*	*1962 Assessed Valuation*
39-41 N. Eighth St.	29'10⅝ x 70'10"	$ 29,500.00
731-33 Filbert St.	30'3" x 60'	$ 18,500.00

(Exhibits P-8, P-13 and P-14).

117. The real estate set forth in Findings Nos. 136 and 137 is to be "sold" by the Defendant Department Stores to the Philadelphia Parking Authority at a price which will be either "the amount which City Stores and Strawbridge & Clothier shall jointly agree upon" or the amount of certain appraisals of those properties adjusted by the same average percentage that the average percentage of all property acquired for the proposed project by negotiation or condemnation shall bear to the appraisals on those properties (Para. 5, Page 2 of Exhibit P-22, as modified by Para. 7 of Exhibit P-23).

118. During the period of the last ten to fifteen years, real estate assessments in the vicinity of 8th & Filbert Streets have generally been on the increase or have remained relatively firm (Exhibit P-13).

119. There has been no substantial downgrading or decline in real estate assessments in the vicinity of 8th & Filbert Streets in the last ten or fifteen years (Exhibit P-13).

120. If the proposed Eighth and Filbert Parking Garage is constructed by the Philadelphia Parking Authority, substantial tax revenues will be lost to the City of Philadelphia.

Competition Eliminated.

121. The plans which have been approved for the proposed parking garage call for retail area to be located on the first floor at the northeast corner of Eighth and Filbert Streets.

122. If the proposed parking garage is constructed, the Defendant Department Stores will have retail selling space at the very spot where Plaintiffs' property is presently located.

123. The volume of sales in recent years by Export-Import Clothing Company has varied from a high of $676,641.44 in the 1951 calendar year to a low of $317,217.12 in the fiscal year from May 1, 1961 to April 30, 1962. Over the period of the last eleven years and four months Export-Import Clothing Company has had sales in the amount of ~~$5,411,098.77~~ (Exhibit P-10).

124. Export-Import Clothing Company has a higher volume of sales of economy priced clothing than any other store in the City of Philadelphia with the exception of the large center city department stores (N. T. Pages 119-121).

125. Since January of 1954, Export-Import Clothing Company has spent $487,562.27 in radio and newspaper advertising of its location and the business operated at that location (Exhibit P-10; N. T. Page 125).

126. Sales from the Export-Import Clothing Company dropped significantly after April, 1961, when Samuel I. Seligsohn, husband to Frances H. Seligsohn, passed away (N. T. Page 129).

127. Lit Bros. 8th and Market Sts. Store sells inexpensive men's, women's and children's apparel, and their Basement Store specializes in the sale of such items (N. T. Pages 83-84).

128. Lit Bros. advertises the sale of its men's, women's and children's wearing apparel primarily in newspapers, but also by radio and television (N. T. Page 84).

129. The plaintiff's store sells the same type of clothing that Strawbridge & Clothier sells (N. T. Page 97).

130. The plaintiff sells clothing in the lower price ranges (N. T. Page 9).

131. The defendant department stores sell clothing in the lower price ranges (N. T. Page 9).

132. The plaintiff, Export-Import Clothing Company, maintains a person or persons who attempts to attract customers into the store for the purpose of selling the wares of the store to the customer (N. T. Page 122).

133. The defendant Department Stores maintain persons who stand in the main aisles of their stores who attempt to attract the attention of customers and to sell the wares of the store (N. T. Page 122, column 123).

134. The plaintiff, Export-Import Clothing Company, and either or both of the defendant Department Stores sell in common, inter alia, the following brands of wearing apparel: Adams Hats, Etna Shirts, Atomic Sportswear, Mickey Brand, Lookfall Line, Brookfield Clothes, Cable raincoats, Champ trousers, Sheep Apparel, Corsair Sportswear, Crown Headlight Wearing Apparel, Irving Foster Wearing Apparel, L. W. Foster Sportswear, Harting Sportswear, I. C. Issiacs Clothing, Terry Cool Coats, Neptune Garments, Owendale R. Originals, Park Circle Clothes, Penn State Clothing, Reed Board Bros. Clothing, Quaker trousers, Rock Sportswear, Rudo Summerwear, A. Shrader Clothing, Sharp Bros. Clothing, Shirley of Atlanta Clothing, Summercraft Clothing, Sport Sheeps Sportswear, Strongwear Sun Face Slacks, United Sheep Lined Leather Goods, Vincelli, Ltd., Clothing, the Line Clothes, Washington Manufacturing Co. Clothing Wellmade Pants, Dacron International Clothing (N. T. Pages 147, 148).

135. Both the plaintiff, Export-Import Clothing Company, and the defendant Department Stores sell seconds or irregulars as part of their merchandise (N. T. Pages 130, 151).

136. Export-Import Clothing Company is in substantial competition with the defendant Department Stores.

137. The condemnation of plaintiff's property will eliminate a significant competitor of the defendant Department Stores.

138. The plaintiffs will suffer irreparable harm and injury unless the proposed taking be enjoined.

Auto Accessories.

139. Lit Bros. Department Store sells automobile accessories at the northwest corner of Filbert and 7th Sts., directly across the street from the northeast corner of its Main Store (N. T. Pages 89 and 90).

140. Automobile accessories were sold at the Lit Bros. Department Store, 8th and Market St. Main Store for a number of years prior to the institution of suit (N. T. Page 110).

141. After the instant suit was begun, i.e., on March 29, 1962, Lit Bros. was still selling automobile accessories at their Main 8th and Market St. Store (N. T. Page 109).

142. The 8th and Market St. Lit Bros. Department Store has signs in it directing customers for automotive supplies to their new automobile supply center at the northwest corner of 7th and Filbert Sts. (N. T. Page 110).

143. Customers still come into Lit Bros. 8th & Market St. Main Store looking for automotive supplies, and such customers are directed to the new location where automotive supplies are sold (N. T. Page 110).

144. If the proposed parking garage is constructed, automobile accessories, tires and supplies will be sold in the Lit Bros. Main Store Shopping and Parking Complex, of which the proposed garage will be a part.

No Competitive Leasing of Commercial Space.

145. Retail store space or commercial space will be located on both sides of 8th St. beginning from Filbert St.

if the proposed parking garage is constructed (N. T. Pages 158, 159).

146. In the Lease among the defendants, commercial space as well as parking space is leased to the defendant Department Stores without distinction (Exhibit P-24).

147. The Lease among the defendants was not entered into after competitive bidding nor on any fair competitive basis.

148. The leasing of commercial space to the defendant Department Stores was not arrived at after competitive bidding, nor on any fair competitive basis (N. T. Pages 62, 159-160, 198).

Abuses by the Parking Authority.

149. A motion for inspection filed by plaintiff on May 4, 1962, asked inspection of the Parking Authority records, and more particularly the reports, surveys, studies and similar material prepared by Wilbur Smith & Associates relating to the Eighth and Filbert Streets Parking Projects in Center City Philadelphia; similar reports, surveys, studies, etc. prepared by National Garages; and other plans, surveys and reports dealing with proposed needs or proposed parking sites in Center City Philadelphia (Motion for Inspection, Pars. 1, 2 and 10).

150. Counsel for the Parking Authority represented to Your Honorable Chancellor on the morning of June 11, 1962, that all such documents had been made available to the plaintiffs (N. T. Page 39).

151. Counsel for the Parking Authority made similar representations before the Honorable Leo Weinrott, Judge of your Honorable Court, at a hearing on the Motion for Inspection on May 15, 1962 (N. T. Pages 39-40).

152. On May 17, 1962, at depositions held in the instant case, Counsel for the Parking Authority stated that every

one of the Wilbur Smith studies, surveys, etc. had been supplied to plaintiffs (N. T. Page 481).

153. Prior to trial which began on the afternoon of June 11, 1962, the only reports, studies, surveys, etc., which had been supplied to plaintiff were the following:

(a) Wilbur Smith Central Business District Parking Study, Volume I (Exhibit P-1).

(b) Wilbur Smith Central Business District Parking Study, Volume II (Exhibit P-2).

(c) Wilbur Smith Economic Analysis for the Proposed Parking Garage at Arch, Eighth and Filbert Sts. (Exhibit P-3).

(d) The National Garages, Inc. Parking Study re: the Eighth Street Parking Project (Exhibit P-4).

154. Counsel for the Parking Authority knew and had been informed by Counsel for the plaintiff that the four documents hereinabove identified were the only four surveys, studies, etc. which had been supplied to plaintiff (N. T. Pages 480-482).

155. Walter Pytko, Executive Director of the Parking Authority, testified that there were no studies other than Exhibits P-1 and P-2 dealing with overall center city needs during the time that he was Managing Director of the Philadelphia Parking Authority (N. T. Pages 75, 76).

156. At the deposition of John P. Robin taken on May 14, 1962, in response to the question of what studies, surveys, reports, etc. there were in connection with downtown parking or parking in the vicinity of 8th and Filbert Sts., Mr. Robin did not in any way refer to Exhibit D-1 (N. T. Pages 432-434).

157. Defendants had in their possession, prior to trial, and introduced at trial, a fifth study or survey, prepared

apparently by Wilbur Smith & Associates, which has been marked Exhibit D-1 and introduced into evidence.

158. Exhibit D-1 was first exhibited to the plaintiff or plaintiff's counsel on the afternoon of June 11, 1962, and had not prior thereto been exhibited or its existence revealed in any way (N. T. Page 70).

159. On the afternoon of Monday, June 11, 1962, the Honorable Chancellor ordered that the files and records of the Parking Authority be made available for inspection after that session of Court (N. T. Page 80).

160. Notwithstanding the direct order of the Court, on June 11, 1962, that the files of the Philadelphia Parking Authority be made available for inspection by the plaintiffs that day, the Philadelphia Parking Authority did not make available for the said inspection certain of its files which contained material relevant to these proceedings (N. T. Pages 173-174).

161. Among the papers contained in the file which was not disclosed to the plaintiffs on June 11, 1962, pursuant to the aforementioned order of the Honorable Court, was Exhibit P-12 (N. T. Pages 174, 175).

162. Mr. Withington testified that all actions and meetings of the Philadelphia Parking Authority are reflected in the Minutes of the Philadelphia Parking Authority (N. T. Page 164).

163. Walter S. Pytko, Executive Director of the Philadelphia Parking Authority, is the person in charge of maintaining the Minutes of the Philadelphia Parking Authority (N. T. Page 172).

164. Walter S. Pytko testified that the Minute Books of the Philadelphia Parking Authority reflected all of the meetings of the Philadelphia Parking Authority.

165. Mr. Pytko testified that the Minute Books for the year 1958-1959 reflected all of the meetings of the Philadelphia Parking Authority with regard to the 8th & Filbert Sts. Project (N. T. Page 169).

166. Walter Pytko testified that there were no meetings of the Philadelphia Parking Authority other than those reflected in the Minute Book (N. T. Page 169).

167. Exhibit P-11 found in the files of the Philadelphia Parking Authority revealed that at an "Executive Session" on August 27, 1959, there was a discussion by the Parking Authority with regard to the proposed parking garage (Exhibit P-11, N. T. Pages 171-173).

168. The Minute Books of the Philadelphia Parking Authority do not reflect any discussion of the proposed parking garage in the minutes therein contained for August 27, 1959 (N. T. Page 172).

169. The Philadelphia Parking Authority holds meetings called Executive Sessions in which their general discussions take place (N. T. Page 181).

170. No minutes are kept of the Executive Sessions of the Philadelphia Parking Authority (N. T. Page 181).

171. Executive Sessions of the Philadelphia Parking Authority are not open to the public (N. T. Page 182).

172. When called to testify on June 11, 1962, slightly over three months after the said meeting of the Philadelphia Parking Authority on February 23, 1962, at which the Lease was adopted, William D. Teefy testified:

(a) That he did not recall what was condemned (N. T. Page 55).

(b) That he did not recall what the drawings submitted at the meeting showed (N. T. Page 55).

(c) That he did not recall whether the Lease relating to Eighth and Filbert Sts. was approved during the year 1962 (N. T. Page 56).

(d) That he did not recall when the rates to be charged at the Eighth & Filbert Sts. Garage were approved by the Philadelphia Parking Authority (N. T. Page 59).

(e) That he did not recall what the amount of rates to be charged at the Eighth & Filbert Sts. Garage were to be (N. T. Page 59).

(f) That he did not know or recall the basis for setting the rates or who suggested them (N. T. Pages 59, 60).

(g) That he did not know how the rates for the Eighth and Filbert Garage compared with rates charged in other garages in the vicinity (N. T. Page 60).

(h) That he did not know whether retail selling space had been leased to Lit Bros. and Strawbridge & Clothier along with the Parking Garage (N. T. Page 62).

(i) That he did not know the rental or the basis of the rental to be charged (N. T. Page 62).

(j) That he did not recall whether he voted in favor of the Eighth & Filbert Streets project (N. T. Pages 62, 63).

(k) That he did not recall whether he considered property assessments in the area as an element in determining whether to vote for or against the proposed garage (N. T. Page 63).

(l) That he did not recall what the traffic congestion was in the area of the proposed garage (N. T. Page 64).

(m) That he did not know whether any traffic congestion would be removed by the proposed parking garage (N. T. Pages 64, 65).

(n) That he did not know that on-street parking would be permitted after the construction of the garage in the vicinity of Eighth & Filbert Streets (N. T. Page 65).

(o) That he could not tell whether on-street parking along Eighth Street impeded the police and fire-fighting equipment (N. T. Page 65).

173. Ralph E. Withington testified, inter alia:

(a) That he did not base the selection of the Eighth and Filbert site on any report or study (N. T. Page 153).

(b) That he did not know what, if any, traffic congestion would be removed by the proposed parking facility at Eighth and Filbert (N. T. Pages 156, 157).

(c) That he did not know what commercial space or space devoted to commercial use was to be afforded to the prospective lessees (N. T. Pages 159, 160).

(d) That he did not know any basis for determining rentals on the commercial space (N. T. Page 160).

(e) That he did not know if rates had been set for the Eighth and Filbert Streets Garage, and that it was his impression that rates had not been set (N. T. Page 164).

174. Depositions of Max H. Raab were taken on May 7, 1962 (N. T. Page 183), and showed:

(a) That he did not know what rental was to be paid by the Lessees of the Eighth and Filbert Streets Garage (N. T. Page 189).

(b) That he did not recall whether Lit Bros. and Strawbridge & Clothier would be permitted under the Lease to extend basement space under the proposed garage, or whether the Lease contained such a term (N. T. Pages 198-199).

(c) That he did not recall how much retail selling space or whether retail selling space was to be made available (N. T. Page 198).

(d) That he did not recall whether proposed rates were incorporated in the Lease or who suggested the proposed rates (N. T. Pages 196, 197).

(e) That he did not recall what the parking rates to be charged at the Eighth and Filbert Garage were (N. T. Page 185).

(f) That he did not recall who first made the suggestion that the legal fee of Counsel for the Parking Authority be paid by other than the Parking Authority (N. T. Pages 194, 195).

(g) That he did not recall whether the Philadelphia Parking Authority was to acquire land at Eighth and Filbert Streets for the parking garage (N. T. Page 194).

(h) That he did not recall whether any studies, surveys or plans were made by the Philadelphia Parking Authority with regard to the Eighth and Filbert project (N. T. Pages 193, 194).

(i) That it was his recollection that the Wilbur Smith Central Business District Parking Studies did not make any specific suggestions or recommendations with regard to prospective parking sites (N. T. Page 190).

(j) That he did not recall who first suggested that the Lease permit signs directing patrons of the parking garage to the defendant Department Stores (N. T. 188).

175. Max Raab, Chairman of the Philadelphia Parking Authority, stated that he had read Exhibits P-1 and P-2 thoroughly, and that there were no suggested parking locations stated in Exhibits P-2 (N. T. Pages 190-191).

176. Exhibit P-2 specifically suggests certain proposed areas for meeting center city parking needs (Pages 35 and 36 of Exhibit P-2).

177. In the deposition of John P. Robin taken May 14, 1962, he testified that he did not negotiate with Drexel & Co. and did not know who was to purchase the bonds from Drexel & Co., etc. (N. T. Page 430).

178. Donald T. Beardsley, of Drexel & Co., testified in conjunction with a signal received by him from Mr. Robin in the Courtroom, that Mr. Robin had first approached Drexel & Co. with regard to bonds for the 8th and Market Sts. project (N. T. Page 356).

179. Mr. Robin testified that his first close contact with a garage in the vicinity of 8th & Filbert Sts. was some two and one-half years prior to trial when a representative of the Parking Authority attended a meeting with the executives of the two defendant Department Stores (N. T. Page 372).

180. The minutes of the Philadelphia Parking Authority dated November 21, 1957 reveal that Mr. Robin had expressed the view in relation to the then proposed 7th and Arch Sts. site, and the proposed garage Lease between Lit Bros. and the Philadelphia Parking Authority, that since "It was Lit Bros. that had sought the Authority in this matter. As the owners desired a garage built, they should advance the Authority money for the necessary study" (N. T. Page 424).

181. Mr. Robin testified that he had never met with the Central District Parking Study Committee (N. T. Page 419).

182. Exhibit P-28 revealed that Mr. John P. Robin was at a meeting of the Central District Parking Study Committee on September 16, 1957, and that a possible site entitled "Lits" was discussed, which site was described as

being located at Arch, Filbert, 7th and 8th Sts. (N. T. Pages 421-422).

183. At his depositions taken on May 14, 1962, Mr. Robin testified that the rate to be used for parking at the 8th & Filbert Sts. garage was suggested by Consultants for the Authority, the National Garages (N. T. Page 431).

184. Mr. Robin testified that the rates for parking set in the Lease among the defendants were adopted from the rates set in the Lease between the Pittsburgh Parking Authority and the Horne Co. (N. T. Page 376).

185. Mr. Robin testified that a proposed Rohm and Haas Building between 6th and 7th below Market Street and a proposed Federal Court Building between 6th and 7th North of Market Street were significant because they would create increased parking demands in the vicinity (N. T. Page 389).

186. Upon cross-examination, Mr. Robin reluctantly admitted that Rohm & Haas would also be constructing a new parking facility at 7th and Market Streets in connection with its construction of the office building (N. T. Page 391).

187. In the criteria established for the Redevelopment Authority in connection with redevelopment of Independence Mall Area, including the area between 6th and 7th Sts., North and South of Market Streets, commercial office buildings constructed in that area will be required to provide one parking space for every 3,000 square feet of commercial office building construction (N. T. Pages 392-395).

188. New construction in the Independence Mall Redevelopment Area will generally carry with it parking sufficient to take care of any new demand created by new construction (Exhibit P-29, para. 5).

189. Mr. Robin testified that he himself was a consultant of the Philadelphia Redevelopment Authority on the

Independence Mall project which includes the area in which the Federal Building will be built (N. T. Page 359). Hence, he himself should have been familiar with the criteria developed for the Redevelopment Authority in that area.

190. After having completed his testimony on June 14, 1962, Mr. John P. Robin was recalled by the defendants on June 20, 1962 and began by testifying that the Philadelphia Parking Authority had considered the mass transportation system in Philadelphia (N. T. Page 454), and the decreases in population (N. T. Page 455) with regard to parking needs.

191. On re-cross examination, Mr. Robin could not recall any meeting of the Parking Authority at which the commuter situation had been discussed (N. T. Page 468), nor any meeting at which the decline in population had been discussed (N. T. Page 469).

192. Studies of the Bureau of Municipal Research issued in 1959 were extremely critical of the use of the Authority Bonds or similar methods of financing by the Philadelphia Parking Authority (Exhibit P-15; P-16).

193. On the security of the Parking Authority alone, a reputable investment banking house could not have issued bonds (N. T. Page 347).

194. The Parking Authority alone was not considered by a reputable investment banking house as adequate security for bonds because they did not have earning power to support bonds issued by them (N. T. Page 63).

195. Not even the pledge of the Philadelphia Parking Authority to turn over all the proceeds from the 8th and Filbert Garage would have been considered by reputable investment banking houses as sufficient security for a bond issue (N. T. Page 355).

CONCLUSIONS OF LAW.

1. The "public use" for which Parking Authorities are given their powers is not merely public parking, a function served by privately owned public parking facilities, but public parking which removes congestion from the streets (Parking Authorities Law, § 2; 53 P. S. § 343; Plaintiff's Brief, Pages 1-8).

2. The Parking Authority Law does not authorize Parking Authorities to exercise their powers for area redevelopment purposes (Parking Authority Law, § 2; 53 P. S. § 343; Plaintiff's Brief, Pages 1-8).

3. The Parking Authority Law does not authorize Parking Authorities to exercise their powers so as to go into competition with privately owned public parking facilities for the purpose of promoting more modern facilities or more reasonable rates.

4. The erection of the proposed Parking Garage at 8th and Filbert Streets will not relieve traffic congestion (Plaintiff's Brief, Pages 1-8).

5. The erection of the proposed Parking Garage at 8th and Filbert Streets will not serve the public purpose or use for which Parking Authorities are created under the Parking Authority Law.

6. The Philadelphia Parking Authority has exceeded its power under the Parking Authority Law in condemning private property for the erection of the 8th and Filbert Streets project.

7. The leasing of commercial space by the Philadelphia Parking Authority to City Stores Company and Strawbridge & Clothier was not on a fair competitive basis. (Plaintiff's Brief, Pages 8-10).

8. The leasing of commercial space not on a fair competitive basis violated Section 5(a) of the Parking Authority Law (Plaintiff's Brief, pages 8-10).

9. The sale of automobile accessories by City Stores Company on premises which are part of an integrated shopping complex of which the proposed Parking Authority Garage will be a part, violates Section 5(a) of the Parking Authority Law (Plaintiff's Brief, pages 11-15).

10. Under the Lease between the defendants, the Philadelphia Parking Authority surrendered its duty to exclusively fix and alter rates as set forth in Section 5(b)(8) of the Parking Authority Law (Plaintiff's Brief, pages 23-26).

11. The proposed parking garage is not established in accordance with a permanent coordinated parking plan as that term is used in Section 5(a) of the Parking Authority Law (Plaintiff's Brief, pgs., 16-19).

12. There is no shortage of public parking facilities in the vicinity of Eighth and Filbert Streets (Findings of Fact Nos. 84 and 87) and no necessity for the condemnation of land for the erection of public parking facilities (Plaintiff's Brief, pgs. 19-22).

13. An exercise of the right of eminent domain must be founded upon the public necessity of the taking (*Darlington v. United States*, 82 Pa. 382; *Winger v. Aires*, 371 Pa. 242, 244; Plaintiff's Brief, pg. 21).

14. The power of eminent domain being in derogation of private rights, must spring from statutory enactment (*Palmer Water Co. v. Lehighton Water Supply Co.*, 280 Pa. 492), and such enactment must be strictly construed; what is not granted specifically by the legislature may not be exercised (*Lance's Appeal*, 55 Pa. 16; *The American Oil Co. v. School District of Philadelphia et al.*, 2 D. & C. 2d 525; Plaintiff's Brief, Pages 21-22).

15. Where the established rights of an individual will be transgressed, an injunction will not be denied because of a balancing of conveniences nor because of the injury an injunction would cause the transgressor (*Stuart v. Gimbel Brothers, Inc. et al.*, 285 Pa. 102; Plaintiff's Brief, Pages 37-38).

16. The erection of the proposed Parking Garage at 8th and Filbert Streets will serve primarily the private purposes and needs of City Stores Company and of Strawbridge and Clothier.

17. The erection of the proposed parking Garage at 8th and Filbert Streets will not serve primarily a public use or public purpose (Plaintiff's Brief, pgs. 27-45).

18. Private property may not be taken for a private use under the power of eminent domain (Plaintiff's Brief, Pages 27-45).

19. Private property may not be taken under the power of eminent domain for other than a public use (Plaintiff's Brief, Pages 27-45).

20. The taking of private property by the power of eminent domain for a private purpose, or for other than a public purpose, violates Article XVI, Section 7 of the Constitution of Pennsylvania (*Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305; 309).

21. The taking of private property by the power of eminent domain for a private purpose, or for other than a public purpose, violates the Due Process Clause of the United States Constitution (*The Citizens Saving and Loan Association of Cleveland, Ohio v. Topeka City*, 20 Wall. 655, 87 U. S. 655, 22 L. Ed 455).

22. The condemnation of plaintiffs' property is the taking of private property of the plaintiffs for the private use of the defendant Department Stores.

23. The condemnation of plaintiffs' property is a taking not for a public use.

24. The Philadelphia Parking Authority has abused its discretion in condemning property for a parking garage in an area where there is no need for additional parking spaces.

25. The Philadelphia Parking Authority has abused its discretion in violating and mis-applying the Parking Authority Law.

26. The Philadelphia Parking Authority has abused its discretion by surrendering its discretion and by failing to exercise the discretion fixed upon it by the Parking Authority Law.

27. The plaintiffs will suffer irreparable harm and damage unless an injunction is issued to restrain the proposed condemnation of their property.

28. The plaintiffs are entitled to an injunction restraining the Philadelphia Parking Authority from condemning land owned and occupied by plaintiffs at 35-37 N. 8th Street in the City of Philadelphia.

Respectfully submitted,

COHEN, SHAPIRO AND COHEN,

By: .....

COURT OF COMMON PLEAS NO. 5.

MARCH TERM, 1962. No. 1626.

IN EQUITY.

FRANCES H. SELIGSOHN AND EXPORT-IMPORT CLOTHING CO.

v.

THE PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY AND STRAWBRIDGE & CLOTHIER.

DEFENDANTS' REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

AND Now come the defendants, The Philadelphia Parking Authority, City Stores Company, and Strawbridge & Clothier, by their respective counsel, Shapiro, Rosenfeld, Stalberg & Cook, and Folz, Bard, Kamsler, Goodis & Greenfield, and Morgan, Lewis & Bockius, and pray the Court to find Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

1. Plaintiff Frances H. Seligsohn is a resident of the City of Philadelphia and the owner of a lot and building at the northeast corner of Eighth and Filbert Streets (35-37 North Eighth Street), Philadelphia, Pennsylvania (hereinafter called "plaintiffs' premises") (Complaint, Par. 1(a), at N. T. 42; N. T. 11).

2. Plaintiff Export-Import Clothing Company is a Pennsylvania corporation engaged in the sale at plaintiffs' premises of relatively inexpensive new and used men's, women's and children's wearing apparel (N. T. 12, 18, 90, 116, 118; Exhibit D-6 at page 5; Exhibit D-7 at pages 7-8).

3. Defendant The Philadelphia Parking Authority (hereinafter called "defendant Authority") is a body corporate and politic, created, existing and acting under the Parking Authority Law of the Commonwealth of Pennsylvania (Act of June 5, 1947, P. L. 458, as amended), and an ordinance of the Council of the City of Philadelphia approved on January 11, 1950 (Complaint, Para. 2(a), at N. T. 43).

4. Defendant City Stores Company is a Delaware corporation with its principal office in New York City, New York, and owns and operates Lit Brothers Department Store at Eighth and Market Streets, Philadelphia, Pennsylvania (Complaint, Par. 2(b), at N. T. 43-44).

5. Defendant Strawbridge & Clothier is a Pennsylvania corporation with its principal place of business at 801 Market Street, Philadelphia, Pennsylvania, at which it operates a department store (Complaint, Par. 2(c), at N. T. 44).

6. Plaintiff Frances H. Seligsohn is the President and sole owner of all of the shares of stock of plaintiff Export-Import Clothing Co. (N. T. 11, 132; D-6 at page 3).

7. Plaintiff Export-Import Clothing Co. occupies, and conducts its business at, plaintiffs' premises as lessee under a lease from plaintiff Frances H. Seligsohn, as lessor. The term of that lease is for a period of five years commencing in 1959 (N. T. 11, 116-117, 131-132; D-6 at pages 4-5; D-7 at pages 3-4).

8. Plaintiffs have filed a Complaint in Equity, seeking to enjoin permanently defendant Authority from condemning plaintiffs' premises or any other property in connection with a proposed multi-story off-street, self-parking public parking project to be located at Eighth and Filbert Streets, Philadelphia, Pennsylvania (hereinafter called "the public parking project"), and to enjoin all defendants from performing certain agreements entered into among themselves relating to the public parking project (Complaint, "Wherefore" Clause).

9. The public parking project is estimated to cost approximately $4,500,000.00, and is described generally in the Acquisition and Construction Program as:

> "Authority proposes to construct on Project Site a parking garage designed for self-parking consisting essentially of sloped-floor parking decks on the east and west side of Eighth Street connected by three decks which will span Eighth Street at approximately 24, 35 and 46 foot elevations. Four entrances will be provided—two on Eighth Street and two on Arch Street, each with an automatic ticket-issuing machine to give time-stamped tickets to incoming customers. In the southwest corner of Garage there will be a circular express exit ramp which will provide a choice of exiting either on Arch, Eighth or Filbert Streets. Passenger elevators are to be provided on both sides of Eighth Street as well as pedestrian access to both Lessees. There will be a total of approximately 315,000 square feet devoted to parking which will provide angular parking for approximately 950 cars. Approximately 24,000 square feet of retail area will be provided in shell form at street level on the Eighth Street frontage, but Authority will not be obligated to improve such space for store purposes. Lessees may develop basement space under Project Site at their own expense." (Exhibit P-24 at page 27.)

History of the Publ Parking Project.

10. Wilbur Smith and Associates is a firm that is a qualified and competent consultant and specialist in the field of parking and traffic (N. T. 451-452).

11. In 1957-58, Wilbur Smith and Associates prepared for, and submitted to, the Philadelphia City Planning Commission a two volume general parking study entitled "Parking Study, Central Business District, Philadelphia, Pennsylvania" (Exhibits P-1, P-2).

12. That Study states in introduction:

> "The central business district of Philadelphia is the focal point of business and civic activities of one of the largest metropolitan areas in the United States. On the average weekday, 750,000 person-trips are made to the central business district via the various modes of travel. The percentage of persons arriving by automobile has steadily increased during the past several years and has created parking and traffic problems which must be alleviated if the stability of the downtown area is to be maintained". (Exhibit P-1 at page 1.)

13. The survey area covered by that Study includes the entire Philadelphia central business district bounded by Spring Garden Street on the north, Delaware River on the east, South Street on the south, and the Schuylkill River on the west (Exhibit P-1 at page 5; Exhibit P-2 at page 3).

14. Within that survey area is designated a "core" area bounded essentially by Arch, Seventh, Locust and Eighteenth Streets (Exhibit P-1 at page 5; Exhibit P-2 at page 3).

15. The public parking project is located within that "core" area.

16. Volume I of that Study was submitted to the Philadelphia City Planning Commission September 16, 1957. It covers and is sub-titled "1958 Parking Demands and Needs", and states in summary:

> "In summary, assuming a status quo of existing facilities, it is anticipated that by 1958 the core area will have a deficiency of approximately 2,900 parking spaces. The remaining area of study is expected to have a surplus of spaces. Many of the present spaces are poorly located with respect to the parking demands and others must be considered very temporary. To reiterate, many of the existing curb spaces will have to be eliminated to provide sufficient street capacities for the increasing traffic volumes. Many of the surface lots will likely be converted to other land uses, particularly in or near the center of the downtown area. These and other factors must be given careful consideration in planning a well balanced parking program". (Exhibit P-1 at page 58.)

17. Volume 2 of that Study was submitted to the Philadelphia City Planning Commission on July 24, 1958. It covers and is sub-titled "1970 Parking Demands and Needs", and states in summary:

> "In summary, the parking space needs of the core area of the business district will double during the next twelve years. The entire survey area will have a net deficiency of 8,274 spaces as compared to a deficiency of only about 1,000 spaces at the present time. It is clearly evident that the development of parking facilities must be accelerated rapidly during the next 12 years in order to meet the parking demands and to maintain the economic stability of the business district". (Exhibit P-2 at pages 31,34)

18. In 1957 or 1958, and as a result of that Study (N. T. 415, 422, 425), Wilbur Smith and Associates pre-

pared for, and submitted to, the Philadelphia City Planning Commission (N. T. 385), a preliminary review of nine potential parking sites. It covers and is entitled "Preliminary Review of Potential Parking Garage Sites, Central Business District, Philadelphia, Pennsylvania", and states:

> "In the discussions with the Central District Parking Study Committee, nine sites have been suggested for possible development as off-street facilities. In the following sections, a brief analysis is given for each site. In some instances, several sites have been suggested which are located in the same area; therefore, a selection must be made. In this preliminary review, an economic analysis has not been prepared for the sites. The final analysis will include a cost-income summary which will be a vital factor in determining the exact sites which should be constructed". (Exhibit D-1 at page 2)

19. That Preliminary Review states with regard specifically to a suggested "7th and Filbert Streets Site":

> "*7th and Filbert Streets Site*
>
> "This site is located in the block bounded by Arch, 7th, Filbert, and 8th Streets. It includes a commercial parking lot now owned and operated by Lith's [sic] Department Store. It is understood that the store would be willing to participate in the development of the facility and no complications are anticipated in the acquisition of the parking facility. A self-parking facility with a capacity ranging up to 600 spaces should be considered for this particular area. Access could be provided on Filbert, 7th and Arch Streets. Also pedestrian flows are not heavy in this particular area. The parking demand potential of the site would be dependent upon the department store and other stores in the general area. Based on the type of

operation and rate schedule, considerable usage could be anticipated. The facility, at the present time, has a demand potential of about 600 to 700 parking spaces". (Exhibit D-1 at pages 10-11)

and states in summary:

"The 7th and Filbert Site could be developed in conjunction with the department stores which may lease or underwrite the development of the facility. This possibility should be considered in analysis of the facility". (Exhibit D-1 at page 13)

20. A public parking authority, by its nature, is expected to produce projects which will sustain revenue bonds and be thus financially independent of the Government with which it is related (N. T. 363).

21. Revenue bonds of a public parking authority, without additional security, are not readily saleable, and normally are not saleable at all (N. T. 364).

22. The basic idea for financing the public parking project through a lease with department stores and revenue bonds secured thereby, came from two similar successful public parking projects in Pittsburgh, Pennsylvania involving the Pittsburgh Public Parking Authority, and the May Company (which operates the Kaufmann Store), and Joseph Horne's Department Store (N. T. 364-365; Depositions of Max Raab at page 34; D-8 at pages 74-76).

23. In September, 1957, the entire public parking program of defendant Authority could be described as being in a state of dormancy. Up to that time, defendant Authority had developed and built two garages (N. T. 362).

24. In September, 1957, the Mayor of the City of Philadelphia appointed a new (the present) Chairman and Vice-Chairman, and told them that he wanted a more energetic public parking policy pursued, and asked them

to start quickly an energetic program (N. T. 362, 366; D-8 at pages 70, 71; Depositions of Max Raab at pages 22, 24).

25. The then (the present) Vice-Chairman of defendant Authority had been for a number of years a member of the Pittsburgh Public Parking Authority, and had worked on, and was familiar with those two projects (N. T. 362-366, 435-436; Depositions of Max Raab at pages 34-35; Exhibit D-8 at pages 70, 74-76); and the Mayor of Philadelphia was familiar with that work (N. T. 366).

26. Accordingly, defendant Authority (acting by and through its then and present chairman and Vice-Chairman) began to work on developing a parking garage system in center city Philadelphia based on leases with department stores (N. T. 366; D-8 at page 74).

27. In 1959, defendant Authority had no particular site selected in the general neighborhood of Eighth and Filbert Streets. The then (the present) Chairman of defendant Authority instituted meetings with Gimbels Department Store, and with Gimbels Department Store and defendant Strawbridge & Clothier, for the purpose of developing a public parking facility at the northeast corner of 9th and Market Streets (N. T. 386; Depositions of Max Raab at pages 9-10, 24; D-8 at pages 75-76; D-10 at pages 13-14).

28. These meetings were unsuccessful because Gimbels Department Store did not wish to go into the project (Depositions of Max Raab at pages 12, 25), and the then (the present) Chairman of defendant Authority then called upon a representative of defendant City Stores Company (Depositions of Max Raab at pages 10-12) and of defendant Strawbridge & Clothier (D-10 at page 15, 23).

29. Defendant Authority and the City of Philadelphia Planning Commission also made proposals to John Wanamaker Department Store, asking it to consider the advantages from its point of view of cooperating in the

construction of a major parking facility at another site (at around Thirteenth and Market Streets (N. T. 386).

30. Subsequently, representatives of all three defendants had a preliminary meeting (N. T. 372; D-8 at pages 72-73, 94; Depositions of Max Raab at pages 12-15) and subsequently many further meetings and conferences regarding the public parking project (Depositions of Max Raab at pages 15-16; D-8 at pages 96-101); D-10 at pages 16-28).

31. As a result of those meetings and conferences, Wilbur Smith and Associates, and National Garages, prepared and submitted respectively the Analysis and Parking Study referred to in findings 32 and 34 hereinbelow (N. T. 375-376; D-8 at page 95; D-10 at pages 46-47).

32. Wilbur Smith and Associates prepared for, and submitted to, defendants City Stores Company and Strawbridge & Clothier (N. T. 375-376; D-10 at pages 18-20, 46; Depositions of Max Raab at pages 22-23) an analysis which covers and is entitled "Economic Analysis, Proposed Parking Garage at Arch, Eighth and Filbert Streets, Philadelphia, Pennsylvania". This analysis covers specifically and only the public parking project, and describes the site as:

> "As given in Figure 1, the proposed Arch, 8th and Filbert Street garage would extend between Arch and Filbert Streets on both sides of 8th Street. It would be immediately adjacent to the Strawbridge & Clothier and Lit Brothers Department Stores. Located in the core area, the project would be developed to primarily serve short-time shopper and business trip parkers". (Exhibit P-3 at page 4)

and states in summary:

> "In summary, the facility would be strategically located to serve parking demands in the core area of the central business district. Good access would be afforded and adequate traffic capacity is available on

adjacent streets to accommodate demands generated by the garage. The facility would be self-liquidating, however, guarantees of debt service payments would make financing more attractive if revenue bonds are utilized". (Exhibit P-3 at page 24).

33. National Garages, Inc. is a company that is expert in the parking field, specializes in parking consultations, and operates numerous parking facilities (N. T. 453).

34. National Garages, Inc. prepared for, and submitted on January 6, 1961 to, defendant Authority (N. T. 376, 429; D-8 at page 81) a parking study which is entitled and covers "Parking Study for Philadelphia Parking Authority, Eighth Street Parking Project". This parking study covers specifically and only the public parking project, and refers to the site as:

> "The site was selected with the objective of providing maximum convenience to the patrons of the Strawbridge and Clothier department store and the Lit Brothers department store. This convenience is further enhanced by the provision of direct access from the upper parking floors across Filbert Street to both these stores. Being only 1 block north of Market Street, this facility is also well situated to serve the customers of Gimbel's department store on the corner of Eighth and Market, as well as the numerous small retail stores along Market between Sixth and Tenth Streets. The potential parking demand generated by Strawbridge's and Lit's alone is far in excess of the capacity of this project. There are no significant existing or presently contemplated parking facilities as conveniently situated to serve these generators". (Exhibit P-4 at page 1)

and states in conclusion:

> "It is our opinion that this project is desirable, the site permits the construction of a most acceptable and

functionally efficient facility, and the net revenue, which can be conservatively expected, provides better than average coverage of annual capital costs if financed in a matter similar to that hypothesized". (Exhibit P-4 at page 19)

35. All of those Studies and Analyses of Wilbur Smith and Associates and National Garages, Inc. (Exhibits P-1, P-2, P-3, P-4 and D-1) were prepared and submitted before the lease (Exhibit P-24) was executed.

36. As a further result of those meetings and conferences, all three defendants executed among themselves two preliminary agreements (hereinafter called "pre-lease agreements"). One pre-lease agreement is dated July 26, 1960 (Exhibit P-20), as amended by a supplementary agreement dated September 13, 1960 (Exhibit P-21); the other pre-lease agreement is dated June 26, 1961 (Exhibit P-22), as amended and supplemented by an amending and supplementary agreement dated September 6, 1961 (Exhibit P-22) (Complaint, Par. 4, at N. T. 44-45).

37. The pre-lease agreements were directed generally to staging the various preliminary phases of the public parking project, including temporary financing, and identifying certain terms to be set forth in the lease (in the event that the lease were ever executed) (Exhibits P-20, P-21, P-22, and P-23).

38. Certain provisions of the pre-lease agreements terminated prior to or upon the execution of the lease; certain other provisions of the pre-lease agreements survived the execution of lease (Exhibit P-24 at Par. 36 and Appendix "C").

The Lease Agreement and Trust Indenture.

39. On or about March 1, 1962, the three defendants entered into among themselves and executed a certain lease agreement dated as of January 1, 1962 (Exhibit P-24),

under the terms of which defendant Authority was lessor and defendants City Stores Company and Strawbridge & Clothier were lessees (Complaint, Par. 9(b), at N. T. 46).

40. The lease was basically the product of negotiations among the defendants and Drexel & Company, the financing institution that set up the bond issue and arranged for the sale of the bonds (N. T. 218-219, 343-345, 347-348, 352, 353, 462-463; Exhibit D-8 at pages 77-78; Exhibit D-10 at pages 27-28).

41. The premises leased under the lease (i.e., the public parking project) are bounded approximately as follows: on the north by the south side of Arch Street; on the south by the south side of Filbert Street east of Eighth Street, and by the north side of Filbert Street west of Eighth Street; on the east by an imaginary line extending from Arch Street to Filbert Street, approximately 140 feet east of Eighth Street; and on the west by an imaginary line extending from Arch Street to Filbert Street, approximately 100 feet west of Eighth Street (Exhibit P-24 at pages 25-26, 28-29).

42. Under the terms of the lease, the public parking project, to be constructed by defendant Authority, was leased by defendant Authority as lessor, to defendants City Stores Company and Strawbridge & Clothier, as lessees. Lessees agreed to operate the project as a public parking facility (Exhibit P-24).

43. The public parking project will be self-parking (N. T. 380), and will have a capacity of approximately 950 cars (Exhibit P-24 at page 27).

44. Defendants used as a guide or model in their negotiations and preparation of the lease, a similar lease that had been negotiated and entered into in 1958 between the Public Parking Authority of Pittsburgh and Joseph Horne Co., a department store in Pittsburgh, Pennsylvania,

covering a similar parking project (Exhibit P-9; N. T. 101, 219, 221, 351, 459).

45. Although the lease in the case at bar follows in general the format and substance of the lease between the Pittsburgh Public Parking Authority and Joseph Horne Co. (Exhibit P-9), the latter lease was not used as a log which had to be followed in every particular (N. T. 459), and there are differences between the two leases (Exhibits P-9 and P-24; N. T. 219-221, 436-450, 458-464, 469-478).

46. Those differences are the result of differences in the overall situations of the two Authorities and the two projects, and are the product of different negotiations (N. T. 459, 462, 463).

47. The public parking project will be accessible to the public from the street through six entrances at street level, and will also be accessible by being physically connected to Lits Department Store, Strawbridge & Clothier's Department Store, and will bridge Eighth Street from Filbert to Arch Street (Complaint, Par. 9(b) at N. T. 46; Exhibit P-24 at page 27).

48. The lease is lengthy and detailed, and some of its salient terms and conditions are set forth in findings 49 through 58 hereinbelow (Exhibit P-24).

49. The term of the lease shall commence on the date of the lease, and will terminate on January 1, 2000, subject to renewal or extension at lessee's option (if the life of defendant Authority is extended) for an additional period which, when added to the original term, will not exceed a period equalling fifty years from the commencement of the original term or which will expire thirty days prior to the expiration of the life of defendant Authority, whichever shall be lesser (Exhibit P-24 at Par. 2 and 27).

50. The public parking project shall be used by lessees for the following purposes only:

"(a) Themselves, their agents, subtenants or licensees operating a public parking facility ('Public Parking Facility') in accordance with the provisions of the Parking Authority Law and this Lease, and conducting such other related activities as may be lawfully conducted on Parking Project and as shall have been approved by Authority, which approval shall not be unreasonably withheld.

"(b) Themselves using or subletting City Stores Space, City Stores Basement Space, Strawbridge & Clothier Space and/or Strawbridge & Clothier Basement Space [the so-called 'commercial' space], in whole or in part, for such use as is legally permissible, but Authority shall not be obligated to improve any such space for store purposes." (Exhibit P-24 at Par. 4)

51. With regard to the operation of the public parking project:

"Lessees agree to operate, or cause to be operated, Parking Project in an efficient and economical manner. Lessees will conduct their operation of Public Parking Facility subject to such rules and regulations as Authority may reasonably from time to time adopt, provided the same shall not violate the terms of the Indenture or the provisions of this Lease. Lessees will comply with all laws, acts, rules, regulations, orders and directions of any legislative, executive, administrative or judicial body applicable to Parking Project." (Exhibit P-24 at Par. 14)

52. Lessees shall pay to lessor annually three differently designated types of rent: "Debt service Rentals"

which approximate between $238,000 and $274,000, and are the fundamental minimum rental designed to cover the interest and amortization on the revenue bonds through which the public parking project is to be financed, and without which there could be no project (Exhibit P-24 at Par. 6; D-8 at pages 76-77); "Authority Rentals" which average $25,000, and are designed to cover defendant Authority's office overhead costs (Exhibit P-24 at Par. 8; N. T. 462); "Excess Rentals" which equal 7% of the annual gross revenue of the project over $675,000 but under $775,000 and 10% of such gross revenue over $775,000, and are designed to protect defendant Authority in the public interest in a long term agreement in the event of inflation (Exhibit P-24 at Par. 9; D-8 at pages 78-79).

53. With regard to the obligation of lessees to pay debt service rentals:

> "Debt Service Rentals and the charges referred to above shall be due and payable in any and all events and regardless of whether there shall be for any reason a delay in the commencement or completion of any part of Acquisition and Construction Program and regardless of whether, because of the insufficiency of the proceeds of Bonds sold for such purpose or for any other reason, Garage shall not be commenced or completed, and regardless of whether Garage shall have been wholly or partially destroyed or damaged, and regardless of whether Lessees shall have the use and occupancy of Parking Project; and Lessees shall pay Debt Service Rentals and such other charges regardless of any failure of Authority to perform any of its obligations under this Lease or any agreement supplemental hereto. The covenants of Lessees to pay Debt Service Rentals and such other charges are separate and individual covenants, and Lessees shall have no right of

setoff, recoupment or counterclaim against Debt Service Rentals." (Exhibit P-24 at Par. 6(c))

54. With regard to signs:

"Lessees and their respective sublessees may erect and maintain appropriate signs upon Parking Project to invite patronage for Garage and Lessees, or to give traffic directions, provided, however, that all such signs are subject to the written approval of Authority, which approval shall not be unreasonably withheld." (Exhibit P-24 at Par. 5)

55. With regard to taxes:

"Lessees will pay promptly all taxes assessed against them or either of them on account of their interest or the interest of either of them in or operations of or upon Parking Project and will also pay all real estate taxes, if any, assessed against or on account of any portion of Parking Project used as City Stores Space, City Stores Basement Space, Strawbridge & Clothier Space or Strawbridge & Clothier Basement Space, provided however, that nothing contained in this paragraph shall require lessees to pay any such taxes so long as they shall in good faith contest such taxes either in their own names or in the name of Authority as may be appropriate. Lessees agree to indemnify and save harmless Authority from any and all claims, damages or liens on account of or arising out of any of the aforesaid taxes." (Exhibit P-24 at Par. 11)

56. With regard to rates:

"The rates and other charges for the use of Public Parking Facility shall be determined by Authority as provided in Section 5(b)(8) of the Parking Authority Law of the Commonwealth of Pennsylvania. Accord-

ingly, Authority, by virtue of the power vested in it under said Section 5(b)(8), and subject to the rights of appeal as therein given to any person questioning the reasonableness of the rates, does hereby fix and agree that during the term of this lease and any renewal or extension thereof it will not reduce, except as provided below, the following rates to be charged for parking during the term of this Lease:

Monthly parking	$35.00 per month
Transient parking—first hour	.35
each additional hour through the fifth hour	.15
each additional hour after fifth hour	.25
maximum for 24 hours	2.50

Rate schedules at less than the above rates or containing various charges for various time periods, not in excess of the above charges, may be put into effect by Authority at the request of Lessees. The parties recognize the desirability of furnishing parking services to the public at the lowest rate consistent with economic management of such facility under the particular type of operation in effect; they also recognize that, if possible, the rates should be fixed so as to assure sufficient revenue to cover the cost of operation of such facility, including all rentals to be paid to Authority. Authority and Lessees desire to make parking space available primarily for those persons parking less than [redacted] hours and they hereby agree that this factor will be borne in mind in any rates fixed by Authority." (Exhibit P-24 at Par. 13)

The purpose of this provision was to make the bonds more saleable (N. T. 376-377). In accordance with the above provision, defendant Authority has fixed temporary lower rates as follows:

Monthly Parking

First floor	$25.00 per month
Upper floors	20.00 per month

Transient Parking

First hour	$ .20
Each additional hour or fraction thereof	.20
Maximum from 8:00 A. M. to midnight	1.50

(Exhibit P-24 at page 33)

57. All obligations of lessees under the lease shall be joint and several (Exhibit P-24 at Par. 30).

58. Approximately 24,000 square feet of space within the public parking project will be available to lessees or their sublessees for commercial or other purposes in accordance with the terms of the lease, on the ground floor along both sides of Eighth Street from Arch to Filbert (Exhibit P-24 at Par. 3).

59. Defendant Strawbridge & Clothier is considering using the commercial space for public parking purposes (Exhibit D-10 at page 438); there is no evidence as to the use that defendant City Stores Company is considering.

60. Title to the public parking project will be in defendant Authority, and ultimately vest in the City of Philadelphia (N. T. 382, 384).

61. Defendant Strawbridge & Clothier does not sell automotive accessories at its Eighth and Market Streets Store (N. T. 114-115; Exhibit D-10 at page 11). Defendant City Stores Company sells automotive accessories in a free standing store on the northwest corner of Filbert and Seventh Streets which is separate and across the street from the main store (N. T. 89-90, 108).

62. The public parking project is to be financed entirely through revenue bonds of defendant Authority, and

without cost to the City of Philadelphia or defendant Authority (N. T. 382, 384).

63. On or about February 28, 1962, defendant Authority and the Provident Tradesmens Bank and Trust Company, as trustee, entered into and executed a Trust Indenture dated as of January 1, 1962 covering an initial issue of four million five hundred thousand dollars ($4,500,000) principal amount of defendant Authority revenue bonds to finance the public parking project (Exhibit P-19).

64. The security for the bonds is the obligation of defendants City Stores Company and Strawbridge and Clothier under the lease (N. T. 346).

65. Bonds of defendant Authority, unsupported by the obligation of two lessees of high financial standing (i.e., defendant City Stores Company and Strawbridge & Clothier) under the lease as security, would not have been saleable (N. T. 347, 353-354, 364).

66. The credit and earning power of defendant Authority would not have been sufficient to support the sale of the bonds (N. T. 353-354, 355, 356, 363).

Exercise of Discretion by Defendant Authority.

67. No fraud has been alleged or proved, and defendants have not committed a fraud or acted in bad faith.

68. In selecting the site for the public parking project and entering into and executing the lease (Exhibit P-24) and the pre-lease agreements (Exhibits P-20, P-21, P-22, and P-23) and condemning the land, defendant Authority was properly exercising its discretion and power.

69. In so exercising its discretion and power, defendant Authority took into consideration generally the cost, size and location of the proposed public parking project (N. T. 378-387, 454-458; D-8 at pages 102-107). Among

the matters that defendant Authority took into consideration specifically are those set forth in sub-paragraphs (a) through (v) hereinbelow:

(a) That there is a need for additional public parking in Center City, Philadelphia (D-8 at page 102), and in the particular area concerned which is subject to complete renewal in the next decade (N. T. 146; D-8 at page 103).

(b) That it is economically feasible to provide a competently operated public parking project for the benefit of the people of Philadelphia, on which no tax funds were being expended, on a self-liquidating basis, and with a financing plan made possible by defendants City Stores Company and Strawbridge & Clothier (N. T. 378, 382; D-8 at pages 102-103).

(c) That defendant Authority as a public body has a great concern for the maintenance of a flourishing business community and a merchandising center in downtown Philadelphia (D-8 at page 102), and that the public parking project strengthens the merchandising center of the center of Philadelphia (D-8 at page 103).

(d) That the closer and more convenient the parking is to the generators of the need and demand for parking, the better the parking provided; that the public parking project is most needed because so many of the people using it would be immediately at their destination (D-8 at pages 102-103); and that the public parking project will be as close to the destination of the shopping public as it is physically possible to be (N. T. 380).

(e) That the registration of automobiles is increasing at all times, and that there is need to park them if there is to be a functioning use of city streets and a center city where people can come and go (N. T. 456; D-8 at pages 103-104).

(f) That merely counting the number of available parking spaces is not enough—the quality of the spaces provided for parkers must also be considered—and that a modern facility, which will be well lighted, well managed, and self parking, is more attractive than an obsolete one (N. T. 378-379).

(g) That self parking is a very fine, important and new technique, and has proved to be very successful because of satisfaction given the parker; that self parking also eliminates the tipping problem (N. T. 379); and that the public parking project will be self parking (N. T. 380).

(h) That downtown Philadelphia has suffered because its parking situation has been chaotic; that rates have been relatively high in most operations, and the facilities have very often been outdated—they are either unpaved or roughly paved open lots, or garages which are now outdated because they are not self-parking or well lighted (N. T. 378-379, D-8 at page 104).

(i) That defendant Authority and the City of Philadelphia, as a matter of policy, wish to encourage short-time parking, or business use, rather than all day parking, in the core area (N. T. 379).

(j) That the size of a garage is important, and a large garage is normally better than a small one (N. T. 380-381).

(k) That there will be extensive new construction in the immediate area which will increase parking demand (N. T. 381-382, 389-390).

(l) That there is a great need in central Philadelphia not only for more parking spaces, but for more modern, more available and more convenient parking spaces at proper rates (D-8 at page 104).

(m) That members of defendant Authority were personally familiar with, and have observed, the traffic con-

ditions and congestion in the area of the public parking project (N. T. 64-65, 154, 156-157).

(n) That the City administration desired to improve the area and provide additional parking facilities (N. T. 157); that the Vice-Chairman of defendant Authority is a member of the City of Philadelphia Parking Policy Committee, which is composed of officials of the City Government and was formed to establish a common policy within the City Government and its various agencies, so that City action in regard to parking will be understood by all people involved (N. T. 360-361); and that defendant Authority reports to that Committee the former's plans and progress in relation to its work (N. T. 361).

(o) That defendant Authority had integrated its efforts with those of the City in trying to obtain a project that met with the approval of the various City agencies concerned (N. T. 373-374); that the public parking project had been approved or endorsed by, and integrated with the plans of, the City's Planning Commission (N. T. 373), Art Commission (N. T. 373), Parking Policy Committee (N. T. 373), Department of Streets (N. T. 373), Department of Public Property (N. T. 373); and that the City's Council passed an ordinance approved by the Mayor on May 31, 1961, the substance of which is described in its title as follows:

> "Authorizing the Philadelphia Parking Authority to erect and maintain a parking garage building over and across Eighth Street, between Filbert street and Arch street, and over and across Filbert street between Seventh and Ninth street, under certain terms and conditions." (Exhibit D-5, N. T. 373-374)

(p) That the status of the proposed and most ambitious Market Street East project is nebulous, not firm, and in a very early stage, and that it would not have been wise

for defendant Authority to withhold any movement or improvement north of Market Street while waiting for the Market Street East project to become firm (N. T. 368-371, 434-435; D-8 at pages 106-107).

(q) That there is proposed, an Expressway System which in Center City alone, will cost approximately $450,000,000 (N. T. 454).

(r) That there was a decrease between 1950-1960 in population within the corporate limits of Philadelphia, but that there was a far above basic average increase in population of the ten counties comprising the metropolitan Philadelphia area of which the City of Philadelphia is the regional center (N. T. 412, 455).

(s) That the City of Philadelphia is making vigorous efforts to add and to transport passengers both to the lines of the Philadelphia Transit Company and the Commuter lines of the Reading and Pennsylvania Railroads (N. T. 413, 454-455, 468-469).

(t) That it is desirable to have as much first floor commercial space as is economically possible in downtown garages (N. T. 374-375; D-8 at page 82).

(u) That there were five relevant studies and analyses of Wilbur Smith and Associates and of National Garages, Inc. which indicated both generally and specifically that the public parking project is needed, desirable and economically feasible (Exhibits P-1, P-2, P-3, P-4, D-1; N. T. 69-76, 378, 384-385, 386-387, 392, 414, 456, 458; D-8 at pages 104-105).

(v) That when private property is taken for a public purpose, there is a tax revenue loss resulting from removal of property from the assessment rolls. However, the taking is justified in that the use of the land is necessary for the maintenance of the community and is therefore, more important than the tax revenue loss. Moreover, by removing a certain area from private to public use, a new value is created in the area, which will more than compensate for

the removal of the taken property from the assessment rolls. Furthermore, from the beginning, defendant Authority will obtain without cost and will have title to a project worth four and a half million dollars (N. T. 63, 383-384).

70. On May 9, 1962 the City of Philadelphia's Zoning Board of Adjustment issued to defendant Authority a use permit for the construction of the proposed public parking facility (Exhibit D-9).

Status of the Public Parking Project.

71. On February 23, 1962, defendant Authority adopted a resolution condemning properties in the vicinity of and to the north of Eighth and Filbert Street for the purpose of acquiring land for the public parking project. On March 6, 1962, defendant Authority filed a Retition and Rule as of Philadelphia Common Pleas Court No. 3, December Term, 1961, No. 4618, for leave to File a Bond (Complaint, Par. 5, at N. T. 45-46).

72. Part of the land so condemned is the plaintiffs' land (Complaint, Par. 4 and 5, at N. T. 45-46; N. T. 11).

73. As a result of the condemnation, title to all the condemned property, including the plaintiffs' land, is vested in defendant Authority (N. T. 464).

74. Defendant Authority has settled for a majority of owners (in numbers, value and area) of the condemned land (N. T. 464-465).

75. Defendant Authority has entered into a contract for the demolition of existing structures on the condemned land, and demolition under that contract is under way (N. T. 465).

76. Defendant Authority has approved plans and specifications for the public parking project, which at the time of trial were out for bids and scheduled to be considered for awards by defendant Authority on June 28, 1962 (N. T. 465).

77. Construction of the public parking project is scheduled to be completed in ten months and be ready for use by the public at the height of the very heavy business season in the following fall (N. T. 465).

78. Defendant Authority is in the process of acquiring possession of all the condemned land (N. T. 465).

79. Revenue bonds of defendant Authority in the amount of four million five hundred thousand ($4,500,000.00) dollars went on the market on January 1, 1962, were sold during the month of February 1962, and delivered on March 1, 1962 (N. T. 346, 348).

80. Drexel & Company is engaged in the business of investment banking, and undertook to set up the bond issue and arrange for the sale of the bonds under the trust indenture (N. T. 344-346; D-8 at page 86).

81. Funds in the amount of $4,500,000.00 received from the sale of those revenue bonds have been deposited with and are in the possession of the trustee, with interest running in accordance with the trust indenture (N. T. 464; Depositions of Max Raab at pages 76-77), and have been and are being used to pay for the acquisition of land and other expenses in connection with the public parking project (N. T. 464).

82. It was brought to the attention of plaintiff Export-Import that space was then available to it for the relocation of its business either on the ground floor of the proposed public parking project itself, or at a nearby location at 834 Arch Street, but plaintiff Export-Import gave no consideration to, and was not interested in, relocation (N. T. 136-138, 140-146; D-7 at pages 14, 19-20).

83. Plaintiffs have neither prayed for nor sought either a preliminary or special injunction (Complaint, "Wherefore" Clause).

CONCLUSIONS OF LAW.

1. No fraud has been alleged, and defendants have not committed a fraud.

2. Defendants have not acted in bad faith.

3. Defendant Authority has not been guilty of capricious or arbitrary action or abuse of discretion or power.

4. The condemnation by defendant Authority of plaintiffs' land and other land to be used for the public parking project was lawful and for a public use, and was not in violation of plaintiffs' Constitutional or other rights.

5. The public parking project is authorized under the Parking Authority Law.

6. Every finding of fact deemed to be a conclusion of law is hereby deemed to be a conclusion of law and incorporated herein as a conclusion of law.

7. Plaintiffs are not entitled to an injunction or any other relief.

8. Defendants are entitled to judgment.

Respectfully submitted,

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SUPPLY OF AND DEMAND FOR PARKING SPACES

Description of block *1	*'58 Available parking spaces* *2	*'58 Parking demands* *2	*'58 Surplus or deficiency*	*'70 Estimated parking demand* *3	*Additional parking spaces added from '58 to '62* *4	*'62 Surplus or deficiency over '70 demand*
Chest-Mkt. 11th-10th	500	197	+303	227	—	+273
Chest-Mkt. 10th-9th	0	189	—189	207	—	—207
Chest-Mkt. 9th-8th	0	508	—508	584	139	—445
Chest-Mkt. 8th-7th	513	146	+367	168	50	+395
Chest-Mkt. 7th-6th	111	86	+25	99	150	+162
Chest-Mkt. 6th-5th	36	0	+36	0	—	+36
Mkt.-Arch 11th-10th	165	186	—21	214	468	+419
Mkt.-Arch 10th-9th	70	116	—46	133	—	—63
Mkt.-Arch 9th-8th	7	264	—257	304	76	—221
Mkt.-Arch 8th-7th	158	283	—125	326	—	—168
Mkt.-Arch 7th-6th	68	112	—44	129	67	—6
Mkt.-Arch 6th-5th	19	21	—2	24	450 - 750	+548 - +848
Arch-Cherry 11th-10th	111	139	—28	160	—	—49
Arch-Cherry 10th-9th	96	71	+25	82	—	—14
Arch-Cherry 9th-8th	44	96	—52	110	—	—66
Arch-Cherry 8th-7th	82	76	+6	87	—	+5
Arch-Cherry 7th-6th	229	32	+197	37	—	+192
Arch-Cherry 6th-5th	8	45	—37	52	—	—54
	2217	2567	—350	2943	1400 - 1700	+737 - +1037

*1. The relevant area taken (11th Street, Cherry Street, 5th Street, Chestnut Street) is the same area as used in the Wilbur Smith & Associates Economic Analysis of the Proposed Parking Garage, Exhibit P-3 (fig. 1 following page 4; N. T. 392). This area extends approximately two blocks west of the Strawbridge & Clothier Store and two blocks east of Lit Bros. Store. This accords with the average walking distance for shoppers in center city as shown in the Wilbur Smith & Associates Central Business District Parking Study, Vol. 1 (pg. 33 of Exhibit P-1; N. T. 237).

*2. Shown in Tables A and P of Exhibit P-1; Wilbur Smith & Associates, Central Business District Parking Study, Vol. 1.

*3. As estimated in accord with measure used in Wilbur Smith & Associates Central Business District Parking Study, Vol. 2 (Page 23 of Exhibit P-2; N. T. 411).

*4. See Notes of Testimony, Pages 397-407. The variation in the "Market-Arch-6th-5th" block is due to the construction of the Independence Mall Garage. When completed, the garage will contain 750 spaces.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963 No. 810

FRANCES H. SELIGSOHN,

Petitioner,

and

EXPORT-IMPORT CLOTHING CO.

v.

THE PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY, and STRAWBRIDGE & CLOTHIER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
1. The Proceedings Below	1
2. The Factual Background	3
ARGUMENT	7
Summary of Argument	7
1. The condemnation of petitioner's property was correctly held to be for a public purpose	7
2. The court below made ample independent judicial inquiry into the question whether the condemnation was for a public use	13
CONCLUSION	15
APPENDIX "A" (Petition for Reargument in Supreme Court of Pennsylvania)	16

Citations

CASES:

Allegheny County *v.* Mashuda Co., 360 U. S. 185 (1959)	9
Beck *v.* Washington, 369 U. S. 541 (1962)	14
Burton *v.* Wilmington Parking Authority, 365 U. S. 715 (1961)	8
Camden Plaza Parking, Inc. *v.* Camden, 16 N. J. 150, 107 A. 2d 1 (1954)	8
Cincinnati *v.* Vester, 281 U. S. 439 (1930)	9
Hairston *v.* Danville & Western R. Co., 208 U. S. 598 (1908)	9
Pittsburgh Public Parking Authority *v.* Board of Property Assessment, Appeals and Review, 377 Pa. 274, 105 A. 2d 165 (1954)	8

PAGE

Rindge Co. *v.* Los Angeles, 262 U. S. 700 (1923) 9

Seligsohn *v.* Philadelphia Parking Authority, 412 Pa. 372, 194 A. 2d 606 (1963) 3

Seligsohn Appeal, 410 Pa. 270, 189 A. 2d 746 (1963) 6

United States ex rel. Tennessee Valley Authority *v.* Welch, 327 U. S. 546 (1946) 9

CONSTITUTION OF THE UNITED STATES:

Fourteenth Amendment 9

STATUTES:

Parking Authority Law of the Commonwealth of Pennsylvania (Act of June 5, 1947, P. L. 458, as amended, 53 Purd. Stat. Ann. §§ 341 et seq.) 2

§ 2 (53 Purd. Stat. Ann. § 342) 10

§ 5 (53 Purd. Stat. Ann. § 345) 10

COURT RULES:

United States Supreme Court Rule 23(1)(f) 14

ORDINANCES:

Ordinance of the Council of the City of Philadelphia approved on January 11, 1950 2

MISCELLANEOUS:

The New York Times, Sunday, February 23, 1964, Section 1, page 69 6

The Philadelphia Inquirer, Sunday, February 23, 1964, Section B, page 1 6

The Sunday Bulletin, February 23, 1964, Section 1, page 3 6

QUESTIONS PRESENTED.

1. Whether this Court should grant certiorari to review the state court's conclusion that a public rather than a private purpose was involved in the respondent Parking Authority's condemnation of real estate, including petitioner's property, for a public parking project to be operated by the respondent department stores under a rental lease from the Authority, where the stores are required by the lease to operate the project as a *public* parking facility, title to the project is to be in the Authority, and the operation of the project by the stores is to be at rates fixed by the Authority and subject to the rules and regulations of the Authority.

2. Whether this Court should grant certiorari because of the petitioner's contention that the state court failed to make an independent judicial review of the question whether the respondent Authority's condemnation was for a private rather than a public purpose, where petitioner did not make this contention in the state court and, in addition, the record clearly shows that the state court did make an independent judicial review of such question.

STATEMENT OF THE CASE.

1. The Proceedings Below.

This was an action commenced by the filing of a complaint in equity in Court of Common Pleas No. 5 of Philadelphia County, Pennsylvania, on March 28, 1962 by plaintiff Frances H. Seligsohn (petitioner here), as owner of a lot and building at the northeast corner of 8th and Filbert Streets in the City of Philadelphia, and by her co-plaintiff lessee, Export-Import Clothing Co., which operated a store in the building for the sale of economy-priced wearing apparel.

The complaint sought permanently, but not preliminarily, to enjoin one of the defendants, The Philadelphia Parking Authority (a respondent here) from condemning

plaintiffs' property or any other property in connection with the Authority's proposed public parking project at 8th and Filbert Streets, and to enjoin the Authority and the other two defendants, City Stores Company and Strawbridge & Clothier (also respondents here), from performing a pre-lease agreement dated June 26, 1960 and a lease agreement executed on or about March 1, 1962, but dated as of January 1, 1962, under which the Authority leased the parking project to defendant City Stores Company and defendant Strawbridge & Clothier for operation as a public parking facility.

The defendant Authority is a body corporate and politic created, existing and acting under the Parking Authority Law of the Commonwealth of Pennsylvania (Act of June 5, 1947, P.L. 458, as amended; 53 Purd. Stat. Ann. §§ 341 et seq.), and an Ordinance of the Council of the City of Philadelphia approved on January 11, 1950. The defendant City Stores Company, a Delaware corporation, owns and operates Lit Brothers Department Store, located on the east side of 8th Street between Market and Filbert Streets, Philadelphia. The defendant Strawbridge & Clothier, a Pennsylvania corporation, operates a department store under that name on the west side of 8th Street between Market and Filbert Streets.

The defendants filed answers to the complaint, and the plaintiffs filed a reply. Thereafter, the cause was heard between June 11 and June 20, 1962 before the Honorable Eugene V. Alessandroni, President Judge of the trial court, sitting as Chancellor.

On December 26, 1962 the Chancellor filed an adjudication containing 59 findings of fact, 6 conclusions of law, and a full discussion, together with an order for the entry of a decree nisi dismissing the complaint. (A copy of the Chancellor's adjudication, order and decree nisi will be found in Appendix "B" to the Petition, at pages 5a-18a.)

The plaintiffs filed 261 exceptions to the Chancellor's rulings, findings and conclusions as set forth in the adjudication and decree nisi. The exceptions were argued before

the trial court en banc on December 15, 1962, and on January 23, 1963 the court en banc, per the Honorable Theodore L. Reimel, J., filed an opinion and order dismissing the exceptions and entering the decree nisi as the final decree. (A copy of the opinion and order of the trial court en banc will be found in Appendix "B" to the Petition, at pages 19a-23a.)

Thereafter, plaintiff Seligsohn, but not her co-plaintiff Export-Import Clothing Co., appealed to the Supreme Court of Pennsylvania, which on February 11, 1963 filed its per curiam opinion and order, affirming the final decree of the trial court. *Seligsohn* v. *Philadelphia Parking Authority*, 412 Pa. 372, 194 A.2d 606 (1963). (A copy of the per curiam opinion and order of the Supreme Court of Pennsylvania appears in Appendix "B" to the Petition, at pages 24a-27a, and a copy of the dissenting opinion is printed at pages 28a-29a thereof.) Seligsohn filed a petition for reargument in the Supreme Court of Pennsylvania, which that court denied on November 13, 1963 without opinion. (A copy of the petition for reargument is printed as Appendix "A" to this brief, at pages 16-23.).

On February 6, 1964 Seligsohn filed her petition with this Court for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania, asserting a violation of her rights under the Fourteenth Amendment to the Constitution of the United States in that her property was allegedly condemned for a private rather than a public purpose and in that the courts below allegedly failed to make an independent judicial inquiry into the question whether the condemnation was for a public or a private purpose.

2. The Factual Background.

On or about March 1, 1962, the three respondents executed a lease, dated as of January 1, 1962 (Exhibit P-24), under which the respondent Authority was the lessor and respondents City Stores Company and Strawbridge & Clothier (the department stores) were the lessees

(Finding of Fact No. 34 (page 10a);* Complaint, Par. 9 (page 33a)). The basic concept of financing the public parking project through a lease with department stores and the issuance of revenue bonds secured by the lease rentals, came from two similar public parking projects in Pittsburgh, Pennsylvania, both involving the Pittsburgh Parking Authority, one with the May Company (which operates the Kaufmann Department Store), and the other with Joseph Horne's Department Store. (Finding of Fact No. 20 (page 8a)).

Under the terms of the lease here involved, a public parking garage, to be constructed by the respondent Authority in the vicinity of 8th and Filbert Streets, Philadelphia,† was leased by the respondent Authority to the respondent department stores, the lessees agreeing to operate the project as a public parking facility (Finding of Fact No. 37 (page 10a); Exhibit P-24, Par. 4) with a capacity of approximately 950 cars (Finding of Fact No. 38 (page 10a); Exhibit P-24 at page 27). Title to the project was to be in the Authority, and ultimately vest in the City of Philadelphia (Finding of Fact No. 41 (page 11a); N.T. 382, 384). The project was to be a *public* parking garage, open to all members of the public indiscriminately. (Finding of Fact No. 37 (page 10a); Exhibit P-24 at pages 10 and 11).

The estimated cost of the public parking project was approximately $4,500,000 (Finding of Fact No. 8 (page 6a)), to be financed entirely through revenue bonds of the Authority, without cost to the City of Philadelphia or the Authority (Finding of Fact No. 42 (page 11a); N.T. 382, 384).

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* Page references herein with the suffix "a" are to the pages of the appendices to the petition for writ of certiorari, unless otherwise indicated.

† The selection of this site for the public parking project was in line with traffic and parking surveys made in 1957-58 and 1961 by Wilbur Smith and Associates and National Garages, Inc., specialists in this field. (Findings of Fact Nos. 9-17 and 26-30 (pages 7a, 9a)).

On or about February 28, 1962, the Authority and the Provident Tradesmens Bank and Trust Company, as trustee, entered into and executed a Trust Indenture dated as of January 1, 1962, covering an initial issue of $4,500,000 principal amount of the Authority's revenue bonds to finance the public parking project (Finding of Fact No. 43 (page 11a); Exhibit P-19). The security for the bonds was the rental obligation of the respondent department stores under the lease (Finding of Fact No. 44 (page 11a); N.T. 346). This security was necessary because bonds of the Authority, unsupported by the rental obligation of two lessees of high financial standing (i.e., the respondent department stores), would not have been saleable (Finding of Fact No. 45 (page 11a); N.T. 347, 353-354, 364). The credit and earning power of the Authority alone would not have been sufficient to support the sale of the bonds (Finding of Fact No. 46 (page 12a); N.T. 353-354, 355, 356, 363).

Prior to the institution of this litigation, revenue bonds of the Authority in the amount of $4,500,000 went on the market on January 1, 1962, were sold during the month of February, 1962, and were delivered on March 1, 1962 (Finding of Fact No. 56 (page 13a); N.T. 346, 349). Funds in the amount of $4,500,000 received from the sale of the revenue bonds were deposited with the trustee, with interest running in accordance with the Trust Indenture (N.T. 464), and these funds were used to pay for the acquisition of land and other expenses in connection with the construction of the public parking project (Finding of Fact No. 58 (page 13a); N.T. 464).

On February 23, 1962, the Authority adopted a resolution condemning properties in the vicinity of and to the north of 8th and Filbert Streets, Philadelphia, for the purpose of acquiring land for the public parking project (Finding of Fact No. 48 (page 12a)); and on March 6, 1962, the Authority filed a petition and rule, as of Philadelphia Common Pleas Court No. 3, December Term, 1961, No. 4618, for leave to file a condemnation bond (Finding of

Fact No. 48 (page 12a); Complaint, Par. 5 (page 32a)).* As previously noted, the properties thus condemned by the Authority included the one on the northeast corner of 8th and Filbert Streets owned by petitioner and leased by her to Export-Import Clothing Co. (Finding of Fact No. 49 (page 12a); Complaint, Par. 4 and 5 (pages 32a, 33a); N.T. 11).

At the time of the trial, title to all of the condemned real estate, including that which had been petitioner's, was vested in the Authority (Finding of Fact No. 50 (page 12a); N.T. 464), which was then in the process of acquiring possession of all of the condemned property (Finding of Fact No. 55 (page 13a); N.T. 465). The Authority had also settled with a majority of owners (in numbers, value and area) of the condemned land (Finding of Fact No. 51 (page 12a); N.T. 464-465); had entered into a contract for the demolition of existing structures on the condemned land, with the demolition under that contract already being under way (Finding of Fact No. 52 (page 12a); N.T. 465); had approved plans and specifications for the public parking project, which at the time of trial were out for bids and scheduled to be considered for awards on June 28, 1962 (Finding of Fact No. 53 (page 12a); N.T. 465); and had scheduled construction of the public parking project to be completed in ten months so that it might be ready for use by the public at the height of the heavy business season in the following autumn (Finding of Fact No. 54 (pages 12, 13a); N.T. 465).†

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* Ensuing litigation between petitioner Seligsohn and the Authority with respect to the condemnation bond was carried to the Supreme Court of Pennsylvania and terminated in the Authority's favor. *Seligsohn Appeal*, 410 Pa. 270, 189 A.2d 746 (1963).

† During the interim since the commencement of this action the public parking project has been completed and was formally opened on February 22, 1964 in public ceremonies addressed by the Mayor of Philadelphia and the Chairman of the Authority. The New York Times, Sunday, February 23, 1964, Section 1, page 69; The Sunday Bulletin, February 23, 1964, Section 1, page 3; The Philadelphia Inquirer, Sunday, February 23, 1964, Section B, page 1.

ARGUMENT.

Summary of Argument.

Both of petitioner's "Questions Presented" are based on wholly erroneous hypotheses of fact.

Petitioner's first Question wrongly implies (1) that the purpose of the public parking project was simply to provide parking for customers of the respondent department stores; (2) that there was no substantial proof of public need for off-street parking in the area; (3) that the sole purpose of the project was to induce people to shop in the department stores; and (4) that the project was the result of a conspiracy to drive petitioner out of business. None of these implications is supportable, as the adjudication and opinions below demonstrate, and the entire issue of public use was peculiarly one for the state courts in the light of local conditions.

Petitioner's second Question incorrectly suggests that the courts below did not make an independent judicial inquiry as to whether the parking project was for a public purpose. Aside from petitioner's failure to raise this point in the courts below, her contention is contrary to the fact.

1. The condemnation of petitioner's property was correctly held to be for a public purpose.

The "public purpose" issue which petitioner asserts in this case is not a substantial one and does not merit review by this Court. In the trial court the Chancellor expressly held that there was a public need for off-street parking in the area (page 16a), and expressly concluded that the Authority's condemnation of the real estate was for a public use (Page 18a). Then the trial court en banc expressly concurred in those views (pages 21a-22a), and still later the Supreme Court of Pennsylvania affirmed the same conclusions per curiam (pages 24a-27a), noting with italics, for emphasis, the petitioner's public use argument, but rejecting her contention with respect

to it. (Pages 26a-27a). Thus, not only the trial court (both the Chancellor and the court en banc) but also the highest court in the state flatly disagreed with the petitioner on the primary point in the case. There was no error in this.

Preliminarily, it should be noted that this Court itself has recognized the public nature of a municipal parking authority's facilities under arrangements not greatly different from those in the present case. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

In the *Burton* case, before constructing the parking facility there involved, the Authority was advised by its retained experts that the anticipated revenue from the parking of cars and the proceeds from the sale of its bonds would not be sufficient to finance the construction costs of the facility. Moreover, the bonds were not expected to be marketable if payable solely out of parking revenues. To secure additional capital needed for its debt-service requirements, and thereby to make bond financing practicable, the Authority decided it was necessary to enter into long-term leases with responsible tenants for commercial use of some of the space available in the projected garage building. One such lease was made with a tenant for use of space in the building as a restaurant. This Court held that the restaurant as well as the rest of the building was dedicated to "public uses" in performance of the Authority's functions, and that accordingly the attempted exclusion of a Negro from the restaurant constituted discriminatory state action in violation of the equal protection clause of the Fourteenth Amendment.

In accord with the view taken by this Court in the *Burton* case, state appellate courts have also held that public land and facilities do not cease to be devoted to a public purpose when leased to private operators as public parking facilities. See, for example, *Camden Plaza Parking, Inc.* v. *Camden*, 16 N.J. 150, 107 A.2d 1 (1954); *Pittsburgh Public Parking Authority* v. *Board of Property Assessment, Appeals and Review*, 377 Pa. 274, 105 A.2d 165 (1954).

In addition, this Court has long recognized that the question whether the taking of property under eminent domain is for a public purpose raises an essentially *factual* issue which can be best resolved by the state courts in the light of local conditions. *Hairston* v. *Danville & Western R. Co.*, 208 U.S. 598, 607 (1908); *Rindge Co.* v. *Los Angeles*, 262 U.S. 700, 705-706 (1923); *Cincinnati* v. *Vester*, 281 U.S. 439, 446-447 (1930); and see *Allegheny County* v. *Mashuda Co.*, 360 U.S. 185, 190 (1959); *United States ex rel. Tennessee Valley Authority* v. *Welch*, 327 U.S. 546, 551-552 (1946).

In *Allegheny County*, supra, involving the taking of property for improving a municipal airport, this Court said that, "The only question for decision is the *purely factual* question whether the County expropriated the respondents' land for private rather than for public use." (360 U.S. 190.) (Emphasis added.)

In *Rindge Co.*, supra, which involved a taking for highway purposes; this Court stated (262 U.S. 705-706):

> "The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State."

In *Welch*, supra, involving condemnation of land by the Tennessee Valley Authority, the Court further observed (327 U.S. 551-552):

> "It is true that this Court did say in *Cincinnati* v. *Vester*, 281 U.S. 439, 446, that 'It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.' But the Court's judgment in that case denied the

> power to condemn 'excess' property on the ground that the state law had not authorized it. And in *Hairston* v. *Danville & Western R. Co.*, 208 U.S. 598, 607, this Court, referring to the 'rule' later stated in the *Vester* case, said that 'No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws.'"

This Court also accords great respect to legislative declarations as to what uses are considered to be public. *Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930); *United States ex rel. Tennessee Valley Authority* v. *Welch*, 327 U.S. 546, 552 (1946). This is significant in the present matter, since the Pennsylvania Legislature has explicitly provided in § 2 of the Parking Authority Law of June 5, 1947, P.L. 458, as amended (53 Purd. Stat. Ann § 342), that the statutory purposes of parking authorities "are hereby declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain"; and has further expressly provided in § 5 of that Law (53 Purd. Stat. Ann. § 345) that such an authority shall have the power, inter alia, to lease land and facilities for parking purposes and to lease portions of the street level or lower floors of parking facilities for commercial use by the lessee.

In the present case, moreover, the lease from the Authority to the department stores and the Chancellor's findings show that the condemnation of the petitioner's property was for a public purpose. In this connection the following points may be particularly noted:

(a) The department stores are obligated to operate the parking project as a public parking facility in accordance with the provisions of the Parking Authority Law and are permitted to conduct only such other related activ-

ities as may be lawfully conducted therein and as shall have been approved by the Authority (Exhibit P-24, at Par. 4).

(b) The department stores must operate the parking project subject to such rules and regulations as the Authority may reasonably from time to time adopt, and must comply with all laws, acts, rules, regulations, orders and directions of any legislative, executive, administrative or judicial body applicable to the parking project (Exhibit P-24, at Par. 14).

(c) The department stores will pay to the Authority annually rental in an amount sufficient to cover the interest and amortization of the revenue bonds, plus $25,000 a year to cover the Authority's office overhead costs, plus an amount equal to 7% of the annual gross revenue of the project over $675,000 up to $775,000 and 10% of the annual gross revenue over $775,000 (Exhibit P-24, at Par. 6, 8 and 9; D-8 at pages 76-79; N.T. 462).

(d) The rentals are due and payable by the department stores in any and all events, regardless of whether the stores have the use and occupancy of the project (Exhibit P-24, at Par. 6-C).

(e) The rates and other charges for the use of the parking facility are determined by the Authority, not by the department stores, who are the lessees of the project responsible for its operation (Exhibit P-24, at Par. 13).

(f) Title to the premises is in the Authority and ultimately will vest in the City of Philadelphia (Finding of Fact No. 41 (page 11a); N.T. 382-4).

(g) The acquisition and construction program provided that the parking project was to be built pursuant to plans and specifications prepared for the Authority pursuant to an agreement it entered into with National Garages, Inc., and that construction was to be contracted for

by the Authority after public advertisement requesting bids (Exhibit P-24, at pages 25-27).

(h) The parking project is to be open to all members of the public and is to be accessible to the public from the street through six entrances at street level, as well as being accessible through the department stores by being connected to them at upper levels of the garage (Findings of Fact No. 37 and 39 (pages 10a and 11a); Exhibit P-24, at page 27).

(i) The project is financed entirely through the Authority's revenue bonds, without cost to it or the City of Philadelphia (Finding of Fact No. 42 (page 11a); N.T. 382-4).

(j) $4,500,000 of revenue bonds were sold by the Authority and the proceeds were turned over to the Trustee named in the indenture under which the bonds were sold (Finding of Fact No. 43 (page 11a)).

(k) Notwithstanding petitioner's assertion to the contrary, the department stores have not guaranteed the revenue bonds. The rentals payable by the stores pursuant to their lease with the Authority were assigned by the latter to the Trustee for the benefit of the bondholders and will be sufficient to pay principal and interest on the bonds. (Exhibit P-24, at page 37).

(l) The department stores may maintain appropriate signs on the project to invite patronage both for the garage and the stores, and to give traffic directions; and all such signs are subject to the written approval of the Authority (Exhibit P-24, at Par. 5).

(m) In keeping with the Authority's normal policy of providing for the use of first-floor space of such projects for commercial purposes, the department stores here were given the right to use or sublet such space and the appurtenant basement space for commercial purposes not forbidden by law, but the stores are required to pay all

taxes in respect of such space (Finding of Fact No. 40 (page 11a); Exhibit P-24, at Par. 4 and 11).

Respondents deem it unnecessary to specify the numerous misinterpretations of the record which appear in the petition for writ of certiorari, either expressly or by implication, in petitioner's effort to show that the purpose of the project is private. An example is petitioner's reference (page 10 of the petition) to the condemnation as having been "preceded" by the lease. In point of fact the resolution of condemnation was adopted by the Authority on February 23, 1962 and the lease was not executed until on or about March 1, 1962, although it was dated "as of" January 1, 1962 (Findings of Fact No. 34 and 48 (pages 10a and 12a)).

Another example is the petitioner's studied effort to suggest (e.g., page 4 of the petition) that the action of the Authority and the department stores was in the nature of a conspiracy to eliminate competition between petitioner (operating through Export-Import Clothing Company) and the department stores—an intimation which the Chancellor described as a rather far-fetched insinuation "without a scintilla of evidence to support it" (page 15a). As a matter of fact, although it was brought to the attention of Export-Import that space was available to it for the relocation of its business either on the ground floor of the public parking project itself, or at a nearby location on Arch Street, Export-Import gave no consideration to relocation (Finding of Fact No. 59 (page 13a); N.T. 136-138, 140-146; D-7 at pages 14, 19-20).

2. The court below made ample independent judicial inquiry into the question whether the condemnation was for a public use.

The petitioner asserts, as a second reason for allowance of a writ of certiorari, that the court below refused to make an independent judicial inquiry into the nature of the condemnation. Apparently this accusation is directed

at both the trial court and the Supreme Court of Pennsylvania. (See Petition, pages 16 and 17). However, the petitioner's contention on this point is raised for the first time in this Court; it was not made in the courts below. Although at every stage of the litigation petitioner contended that the condemnation had not been for a public purpose, she is now for the first time asserting that the court below did not make an independent judicial inquiry into that question. Even in the petition for reargument in the Supreme Court of Pennsylvania (Appendix "A" to this brief) she did not raise the issue. Accordingly, the point should not be considered here. *Beck* v. *Washington*, 369 U.S. 541, 549-550 (1962).*

Even if petitioner had raised this issue in a timely manner, it would still be without merit, because the record plainly shows that the courts below did make independent judicial inquiry into the public or private nature of the purpose of the condemnation. First, the Chancellor made his own complete and independent judicial inquiry into the question, discussed it fully in his adjudication, and came to the explicit conclusion that the condemnation was for a public purpose (pages 15a, 16a, 18a). Next, the trial court en banc made a second complete and independent judicial inquiry of the issue, reaching the same conclusion as had the Chancellor (pages 20a-22a). Finally, the Supreme Court of Pennsylvania reviewed the question and

* In addition, the petitioner has not complied with this Court's Rule 23(1)(f), which provides that where one seeks review of a state court judgment, "the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

affirmed the lower court in a per curiam opinion which took pains to note in italics, for emphasis, that one of the petitioner's arguments was that the condemnation had not been for a public use (page 26a).

In the light of the record, therefore, it is manifest that there was not merely one independent judicial inquiry into the nature of the condemnation, but in fact there were three such inquiries into the issue.

CONCLUSION.

For the foregoing reasons the petition for writ of certiorari should be denied.

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APPENDIX "A"

PETITION FOR REARGUMENT.

To the Honorable, the Justices of the Supreme Court:

I.

PRELIMINARY STATEMENT.

The Appeal in this case was argued under very unusual circumstances. At the time of argument Your Honorable Court did not have the Briefs of the parties before it, and did not receive those Briefs until several weeks after argument. On the day of argument Your Honorable Court instructed counsel not to print the Record until he was instructed as to which portions of the Record Your Honorable Court wished to have printed. No such instructions were forthcoming, and accordingly at the time of decision the individual Justices of Your Honorable Court did not have copies of the Record before them in convenient form as an aid in their deliberations.

These unusual circumstances arose because of the unavailability of the Record from the court below in time for printing prior to the date on which the Record was due to be served upon Appellees and filed with Your Honorable Court. A resulting series of petitions, answers and motions were not resolved until the actual day of argument.

It is respectfully submitted that the lack of a printed record and the confusion resulting from the unusual petitions, motions and directions, tended to seriously obscure the basic issues presented in this rather complex piece of litigation.

This Petition prays that a Reargument be granted so that the case may be heard without extraneous confusion, and with the printed Briefs and Records in the hands of Your Honorable Court.

II.

MISAPPREHENSION AS TO THE SIGNIFICANCE OF THE ISSUES PRESENTED.

Perhaps the most perplexing and difficult area of the law today relates to the conflict between the felt needs of communities in the throes of urbanization (regarding transportation, parking, etc.), and traditional conceptions of private property rights as an incident of individual liberty. This case raises that conflict in its sharpest perspectives.

The Appellees and the Court below have taken the view that a condemnation is proper to aid private business interests when those business interests in turn benefit the economic health of the community. Appellants hold that takings of the private property of one individual for direct use by and for the primary benefit of other private persons have not heretofore been sanctioned by the courts of this Commonwealth or the other courts of this nation, and should not be.

It is respectfully submitted that the Majority Opinion of Your Honorable Court does not appear to have adequately considered the effect of its decision and the sweeping nature of the change in individual property rights which follows in the wake of that decision.

III.

MISAPPREHENSION AS TO THE NATURE OF THE WITHIN CASE.

The Per Curiam Opinion treats the instant case as if it were a purely factual one and virtually the entire Opinion is stated in the conclusionary phrase "that the Court below acted with propriety in entering this decree".

It is respectfully submitted that the basic questions presented on this appeal raise *legal and interpretive*, as distinguished from factual problems:

(1) Appellants' Brief, pages 30 through 40, deals with a problem of statutory construction not heretofore raised in any reported case in Pennsylvania: Does the Parking Authority Law limit an Authority's power of condemnation to projects which will relieve traffic congestion, or does it permit the exercise of that condemnation power when an incidental purpose is parking?

(2) Do the uncontroverted facts (the genesis of the plan, the terms of the leasing, the benefits derived, the guarantees extended, etc.) make out a taking for private purposes as a matter of law?

(3) Are certain statutory prohibitions in the Parking Authority Law contravened by the written lease in this case?

IV.

THE MAJORITY OPINION OVERLOOKED THE EVIDENTIARY QUESTIONS RAISED.

The Majority Opinion refers to the third of the three types of evidentiary rulings complained of in this case, but does not even refer, much less dispose, of the first two evidentiary questions posed:

(1) Was Appellants' Motion for Inspection of Documents properly denied? (Appellants' Brief, pages 89-99).

(2) Did the Chancellor err in admitting entire depositions of Appellees' officers upon Appellees' motion, over Appellants' objections? (Appellants' Brief, pages 99-101).

It is respectfully submitted that serious and basic questions of the operation of the Discovery Rules promulgated by Your Honorable Court are involved in this case and not disposed of.

V.

THE MAJORITY OPINION HAS NOT DEALT WITH THE CONSTITUTIONAL ISSUES POSED

Appellant has raised basic constitutional questions, both under the Pennsylvania Constitution and the Federal Constitution. Section 3 of Appellants' Brief, (pages 41-77) is headed:

> "The Eighth and Filbert Streets Project of the Philadelphia Parking Authority Is a Taking for a Private Rather Than a Public Purpose, and Is Therefore Violative of the Constitution of the United States and of the Commonwealth."

Paragraph 15 of Appellants' Complaint, the Requests for Findings, and the Exceptions in the Court below, all raise the fundamental Federal and State Constitutional questions.

Nevertheless, the Majority Opinion does not discuss the Constitutional issues raised.

It is respectfully submitted that not only are Appellants' constitutional rights seriously involved in this case, but a clarification of the constitutional rights of others similarly situated is desperately needed. The effect of the Majority Opinion as it now stands is to seriously limit the scope of heretofore recognized individual property rights.

VI.

MISAPPREHENSION AS TO SURVEYS AND STUDIES IN THIS CASE.

The Majority Opinion of Your Honorable Court notes in its recitation of facts that several surveys and studies had been made with regard to parking and that "The Authority had the benefit of such studies and surveys."

That Opinion does not appear to comprehend, however, that *the surveys and studies showed that there is no*

public need for a parking facility at 8th and Filbert Streets.

The surveys and studies were introduced into evidence by Appellants, not Appellees, because they showed that the projected *1970 need* for parking spaces in the vicinity of the project in question had already been considerably exceeded in 1962. The Center City Studies dealing with the selection of parking sites were Exhibits P-1 and P-2. The Studies dealing with the *economic* feasibility of a site at 8th and Filbert Streets were Exhibits P-3 and P-4. The relevant *uncontradicted* supply and demand statistics are set forth in Appellants' Brief at Pages 64 and 65. They reveal a 1962 surplus of between 737 and 1037 parking spaces over the projected 1970 parking demand of 2943 spaces!

Exhibits P-2 and Exhibit P-5 are the only significant studies which make recommendations for meeting parking demands between the Delaware and Schuylkill Rivers in downtown Philadelphia. Although they recommend a variety of parking projects in various areas, *they do not recommend a parking facility in the vicinity of 8th and Filbert Streets.* (A comprehensive analysis of the said studies is set forth at pages 60 through 66 of Appellants' Brief).

Furthermore, at least a majority of the Parking Authority Members when called to testify showed either complete ignorance of the matter contained in the studies and surveys (see references noted at pages 15-19 of Appellants' Brief) or made clear that the studies and surveys were not considered by them. Parking Authority Member Withington, for example, the maker of the motion to condemn, testified: (N.T. p. 153):

> "Q. Mr. Withington, did you base the selection of the 8th and Filbert site on a report or study?
>
> A. No, sir."

It is respectfully submitted that the Majority Opinion of Your Honorable Court misapprehended the fact that although the Parking Authority did have studies and surveys available to it, it completely ignored the facts and recommendations contained in them.

VII.

MISAPPREHENSION AS TO THE NEED FOR PRIVATE GUARANTORS OF PARKING AUTHORITY BONDS.

The Majority Opinion of Your Honorable Court refers to the difficulties of financing a parking authority project and the "necessity" for guarantors, as if that were a general difficulty inherent in all parking projects.

This is simply untrue. The 10th and Ludlow Parking Authority Garage, located some three blocks from 8th and Filbert, and the 19th and Walnut Parking Authority Garage, among others, have been financed by Authority bond sales without additional security supplied by department stores or any other private persons. (Deposition of Max Raab, p. 97).

It is respectfully suggested that *the reason this particular bond issue was not feasible without guarantors was that there was no public need or demand for the facilities* sufficient to assure the project's solvency. It is clear that the Lits and Strawbridge & Clothier guarantee was given and this garage constructed because of the private benefit to be gotten by those stores.

VIII.

THE FORM OF YOUR HONORABLE COURT'S DECISION.

The Opinion of Your Honorable Court is designated a Per Curiam Opinion, and yet there is a Dissenting Opinion in which three of the seven Justices of Your Honorable

Court concur attacking the basis of the Per Curiam Opinion. The effect of this unusual form of opinion is bound to create considerable confusion in a hitherto clear area of the law.

In the leading case of *Clarke* v. *Western Assurance Co.*, 146 Pa. 561, 570 (1892), 23 A. 248, 249, 15 L.R.A. 127, 28 Am. St. Rep. 821, which considered the effect of a per curiam opinion Mr. Chief Justice Paxson took pains to point out, at page 570:

> "A Per Curiam is the opinion of the court in a case in which we are all of one mind, and so clear that we do not think it necessary to elaborate it by an extended discussion."

Prior to the instant decision, this had been the law of the Commonwealth, and has been adopted by other courts in the country as *the* authoritive statement regarding the nature of a Per Curiam decision: *Minor* v. *Fike*, 93 P. 264, 77 Kan. 806; *Newmons* v. *Lake Worth Drainage Dist. for Use and Benefit of Martin, Fla.*, 87 So. 2d 49, 50.

It would seem clear in view of the tenor of the Dissenting Opinion, that the Justices of Your Honorable Court are certainly not of one mind in this case, and that the questions involved are far from clear. It is respectfully submitted that those views do in fact require elaboration by a more comprehensive and extended opinion from Your Honorable Court.

WHEREAS, Your Petitioner respectfully prays that Your Honorable Court grant a reargument on this appeal, and allow time for the printing of the Record prior thereto.

COHEN, SHAPIRO AND COHEN
By:
NATHAN B. FEINSTEIN
Attorneys for Appellants

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

NATHAN B. FEINSTEIN, ESQUIRE, being duly sworn according to law, deposes and says that he is a member of the firm of COHEN, SHAPIRO AND COHEN, attorneys for the Appellants, and that the foregoing Petition For Reargument and statements made therein are all presented in good faith and that the said Petition is not filed for the purpose of delay.

NATHAN B. FEINSTEIN

Sworn to and subscribed before me the 21st day of October, 1963,

/s/ ELIZABETH SHARE
Notary Public.

[Copies of the Opinion of the Supreme Court of Pennsylvania and the Dissenting Opinion, which were attached to the Petition for Reargument, are not reproduced here, as they are printed in Appendix "B" to the Petition for Writ of Certiorari, at pages 24a-29a.]